Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

PETER DiBIAGIO and LAURA DiBIAGIO,
EDMUND T. KARAM and BARBARA KARAM,

Petitioners,

v.

STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION and ROBERT SHINN, Commissioner of the Department of Environmental Protection,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Where the State of New Jersey sold tide-flowed land in fee simple, and the deed conveyed the "right and privilege" to build a pier but prohibited all other uses of the land, and the State subsequently denies the landowner a permit to build a pier based upon regulations designed to protect shellfish habitat:

1. Does the permit denial effectively prohibit all reasonable use of the land and thus constitute a compensable taking under the Fifth Amendment?

2. May the State escape liability for a compensable taking merely because the landowner also owns and resides on the adjacent upland lot, which was not part of the conveyance from the State and to which the shellfish habitat regulations are inapplicable?

LIST OF PARTIES

Peter DiBiagio and Laura DiBiagio, husband and wife, are individual citizens and residents of New Jersey.

Edmund T. Karam and Barbara Karam, husband and wife, are individual citizens and residents of New Jersey.

The New Jersey Department of Environmental Protection is a cabinet level department in the executive branch of the State of New Jersey.

Robert Shinn is the Commissioner of the New Jersey Department of Environmental Protection.

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Peter and Laura DiBiagio and Edmund and Barbara Karam respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of New Jersey in this case.

OPINIONS BELOW

The opinion of the New Jersey Supreme Court was filed on February 24, 1999, and is reported at 157 N.J. 187, 723 A.2d 943 (1999). App. 1a. The opinion of the New Jersey Superior Court, Appellate Division, is reported at 308 N.J. Super. 225, 705 A.2d 1221 (N.J. App. Div. 1998). App. 3a. The relevant prior orders of the New Jersey Superior Court, Law Division are unreported but are included at App. 22a-27a. The decision of the Commissioner of the New Jersey Department of Environmental Protection (NJDEP) affirming the decision of the Administrative Law Judge is included at App. 28a. The opinion of the New Jersey Office of Administrative Law affirming the denial of a waterfront development permit is included at App. 30a. The denial by NJDEP of a waterfront development permit is included at App. 65a.

STATEMENT OF JURISDICTION

The New Jersey Supreme Court filed its opinion on February 24, 1999. This case involves claims for a regulatory taking of property without payment of just compensation in violation of the Fifth Amendment to the United States Constitution. Accordingly, the jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, United States Constitution:

> Section 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New Jersey State Constitution, Article 1, ¶ 20:

> Private property shall not be taken for public use without just compensation. Individuals or private corporations shall not be authorized to take private property for public use without just compensation first made to the owners.

Pertinent portions of the applicable state regulations are at App. 72a-73a.

STATEMENT OF THE CASE

This case involves a parcel of submerged, tide-flowed land ("Riparian Parcel") located within the Manasquan River in Brielle, Monmouth County, New Jersey. The Riparian Parcel is approximately 118 feet wide along the shoreline, extends into the river 230 to 290 feet from the shore, and comprises 30,680 square feet. It is undeveloped. The lot is designated on the Brielle tax map as Block 99.03, Lot 5.01.

Title to the Riparian Parcel extends from a riparian grant conveyed in 1924 by the State of New Jersey to Charles and May Schweinert. The Schweinerts applied to the New Jersey Board of Commerce and Navigation for a grant in fee simple of the land beneath the Manasquan River lying adjacent to their upland property along the banks of the river. For consideration of $5,301, the Board conveyed to the Schweinerts and their heirs and assigns approximately 523,681 square feet of submerged land.

When the State conveyed the tidal land to the Schweinerts, it included a covenant which limited the use which could be made of the land. Under the terms of the deed, the State conveyed the submerged land to the Schweinerts with the "right and privilege" to fill the land (i.e., "to exclude the tidewater from so much of the lands . . . as are under tidewater, by filling in or otherwise improving the same, and to appropriate the lands . . . to their exclusive private uses"), and to construct piers. In fact, the deed quite specifically provides that beyond the limit of fill, or "bulkhead line," the land "is not to be used for any purposes whatsoever except erection of a pier or piers thereon, underneath which the tide may ebb and flow, and no solid filling shall be placed thereon."

Thus, the State conveyed to the Schweinerts a fee simple estate in the tidal land subject to a restriction in perpetuity that the *only* use permitted beyond the bulkhead line is "the erection of a pier or piers thereon, underneath which the tide may ebb and flow." Over the years, the Schweinerts subdivided their upland property and their tidal land and sold off the various subdivided portions. Homes were constructed on the upland lots, and piers were built on many of the riparian lots.

In January 1993, Petitioners Edmund and Barbara Karam purchased the Riparian Parcel, along with an adjacent upland riverfront lot (Block 99.03, Lot 5) which contains a single family dwelling. The Riparian Parcel is undeveloped — it has never been filled, nor was a pier constructed. Because they are boating enthusiasts, the Karams applied to the New Jersey Department of Environmental Protection (NJDEP) in February 1993 for a waterfront development permit to construct a pier. The Karams reasonably expected that a permit for a dock or pier would be issued by NJDEP for several reasons: (1) the riparian grant from the State to their predecessors in title, the Schweinerts, expressly conveyed the exclusive right to construct a "pier or piers"; (2) numerous piers and docks had already been approved and constructed by the Karam's neighbors along the Manasquan River, including a pier permitted by NJDEP and constructed immediately next door in 1987; and (3) the applicable regulatory scheme did not prohibit construction of a pier on the Riparian Parcel.

Mr. Karam submitted two different plans for the pier to NJDEP, one proposing the pier on the eastern side of the Riparian Parcel, and one on the western side. After reviewing the application, on May 11, 1993, NJDEP denied

the Karams a waterfront development permit pursuant to N.J.A.C. 7:7E-3.2(d), which prohibits the construction of docks and piers in "shellfish habitat."

The Karams appealed NJDEP's waterfront development permit denial, and the case was referred to the New Jersey Office of Administrative Law in September 1993. A trial was conducted in December 1994, at which expert testimony was presented by both sides on the issue of whether hardshell clam habitat actually exists within the Riparian Parcel. In April 1995, the Administrative Law Judge (ALJ) found that clam habitat exists on the site. As a result, the ALJ concluded that construction of the proposed pier is prohibited by N.J.A.C. 7:7E-3.2(d) because of the presence of shellfish habitat. The Commissioner of NJDEP issued a Final Decision in June 1995 affirming the decision of the ALJ.

Following the NJDEP Commissioner's final decision (which exhausted Petitioners' administrative remedies), the Karams filed a Complaint in the Superior Court of New Jersey, Law Division, seeking compensation for the regulatory taking of the Riparian Parcel under the Fifth Amendment to the United States Constitution and Article One of the New Jersey Constitution. As a result of NJDEP's denial of a waterfront development permit and the deed restrictions imposed by the State in the riparian grant, the Karams were unable to make any beneficial use of the Riparian Parcel. The effect of the permit denial was to compel the Karams to leave the Riparian Parcel entirely in its natural state. Thus, this lawsuit presented the trial court with a seemingly clear-cut case of a categorical taking of private property as defined in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L.

Ed. 2d 798 (1992), because the government's permit denial effectively deprived the owners of *all* economically beneficial use of their land.

While the litigation was pending, the Karams (their expectations of constructing a pier on the Riparian Parcel having been destroyed) decided to sell the Riparian Parcel, as well as the adjacent upland lot containing the home, to Petitioners Peter and Laura DiBiagio. The DiBiagios purchased the two parcels from the Karams in June 1996. The sales contract acknowledged the ongoing litigation. Under the contract, the Karams may recover the amount they expended for this litigation, while the DiBiagios are entitled to continue the litigation and recover the balance of any award of damages in this case.

On August 23, 1996, the trial court granted the Karams' motion for partial summary judgment, holding that NJDEP's denial of the development permit constituted a regulatory taking of the Riparian Parcel for which compensation must be paid. NJDEP's motion for reconsideration of this decision was denied.

NJDEP appealed the judgment to the New Jersey Superior Court, Appellate Division. The appellate court agreed with the trial judge's determination that all economically beneficial use of the Riparian Parcel had been taken as a result of NJDEP's denial of the permit. *Karam v. Department of Environmental Protection*, 308 N.J. Super. 225, 236, 705 A.2d 1221, 1226-27 (N.J. App. Div. 1998). The Appellate Division concluded that:

> the consequent denial of a development permit clearly destroys the only beneficial use of

> plaintiffs' riparian land. The terms of the riparian grant are clear — "[the] land . . . is not to be used for any purpose whatsoever except the erection of a pier. . . ." The effect of the regulatory scheme, therefore, is to sacrifice all economically beneficial uses in the riparian grant in the name of the common good.

Karam, 308 N.J. Super. at 236, 705 A.2d at 1227. In addition, the court acknowledged that the State was not excused from its constitutional obligation to pay compensation based on the State's police power to regulate under the common law of nuisance, noting that: "the DEP does not claim that the proposed use of the riparian land, erection of a dock, constitutes a common law nuisance that may be proscribed by the State." 308 N.J. Super. at 235, 705 A.2d at 1226.

Thus, the primary focus of the Appellate Division's decision was on the "denominator issue," or the extent of the plaintiffs' land against which a taking shall be measured.[1] The New Jersey court acknowledged that if the

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1. As this Court explained in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987):

> Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'

Id. at 497, 107 S. Ct. at 1247-48.

denominator is the Riparian Parcel alone, a compensable taking would necessarily result:

> Were we to consider the riparian grant alone as the property interest against which the loss of value is to be measured, we would be obliged to sustain Plaintiffs' claim of inverse condemnation because the effect of the regulation is to compel the property owners to leave the tide-flowed land entirely idle.

308 N.J. Super. at 236-37, 705 A.2d at 1227.

On the other hand, the court indicated that no compensable taking would be found if the denominator consisted of the Riparian Parcel plus the upland lot containing the home, presumably because the home is a reasonable use:

> Conversely, were we to consider the upland and riparian parcels as a single unit of property against which the loss of value is to be measured, we would be required to reject Plaintiffs' claim of inverse condemnation because the effect of the regulation is merely to destroy a somewhat minor "strand" or "stick" in Plaintiffs' overall bundle of rights.

Karam, 308 N.J. Super. at 237, 705 A.2d at 1227.

The Appellate Division concluded that the Riparian Parcel and the adjacent upland homesite must be treated as a "single property unit" for purposes of its takings analysis. The court believed that the following factors supported its

decision: (1) the Schweinerts were the owners of the riverfront upland when they originally purchased the tide-flowed land, and the grant would have been void if the Schweinerts were not the owners of the adjacent upland at the time of conveyance in 1924; (2) erection of a pier on the Riparian Parcel would be a "mere incident to the use of the upland property"; (3) the Riparian Parcel and the upland parcel were always bought and sold together; and (4) Petitioners received one tax bill for both parcels. Without explaining how these observations are in any way relevant to takings analysis, the court held that no compensable taking had occurred.

The appellate court failed to consider that the *State itself* had originally created and defined a unique property interest by conveying the Riparian Parcel, prohibiting any prospective use other than the construction of a pier, and then denying a permit for a pier. The court also failed to acknowledge that the upland homesite was not part of the conveyance from the State; indeed, the State has never owned that land. Finally, the court ignored the essential difference in character (as well as the consequent development expectations) between the Riparian Parcel (which is completely under water) and the upland lot (which is a developable lot containing a home). The State's waterfront development permit jurisdiction extends only to the Riparian Parcel, and not to the upland lot.

Petitioners appealed the Appellate Division's final judgment to the New Jersey Supreme Court. On February 24, 1999, the New Jersey Supreme Court (per curiam) affirmed the appellate court judgment "substantially for the reasons expressed" by the Appellate Division. 157 N.J. 187, 188, 723 A.2d 943 (1999). On March 19, 1999, Petitioners filed an untimely motion for reconsideration, *nunc pro tunc*, by the New Jersey Supreme Court. No ruling has been issued on the motion for reconsideration as of this time.

REASONS FOR GRANTING THE WRIT

The New Jersey Supreme Court's judgment turned on its analysis of one of the most unsettled issues in regulatory taking cases — the denominator question. This Court acknowledged the importance of that issue over ten years ago in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497, 107 S. Ct. 1232, 1248, 94 L. Ed. 2d 472 (1987) ("one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction'"). Although the Court has alluded to the importance of the denominator question several times over the past twenty years,[2] the Court has yet to provide specific guidance on this question which is central to takings law. Filling this gap in the Court's Fifth Amendment Takings Clause jurisprudence is much needed, and the factual circumstances of this case provide an excellent opportunity for the Court to rule on the denominator question.

In the absence of an authoritative pronouncement from this Court, state and federal courts of appeal have articulated and applied a variety of conflicting standards or tests when confronted with the denominator issue. Indeed, the Appellate Division below complained that past judicial precedents consist of "a welter of seemingly irreconcilable opinions." *Karam*, 308 N.J. Super. at 232, 705 A.2d at 1225. As a result, the court observed that in "resolving the issue before us, we tread upon uncertain and constantly shifting terrain." *Id.* Courts have never agreed on the appropriate

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2. *See, e.g., Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 130, 98 S. Ct. 2646, 2662, 57 L. Ed. 2d 631 (1978); *id.* at 149 n.13, 98 S. Ct. at 2672 n.13 (Rehnquist, C.J. dissenting).

method of resolving the denominator question and prior cases offer little guidance for subsequent decisionmakers. The current state of confusion and conflict, which subjects Fifth Amendment rights to the vagaries of forum and geography, can only be resolved by an authoritative pronouncement from this Court.

I.

THE NEW JERSEY SUPREME COURT'S JUDGMENT IN THIS CASE DECIDES A FUNDAMENTAL ISSUE FOR REGULATORY TAKINGS JURISPRUDENCE THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT

The denominator question is undoubtedly a fundamental issue for regulatory takings claims under the Fifth Amendment. This Court has repeatedly noted its importance. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992), the Court briefly analyzed the issue, and the "inconsistent pronouncements by the Court" on the question:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as

> one in which the owner has suffered a mere diminution in value of the tract as a whole. . . . Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court.

Lucas, 505 U.S. at 1016 n.7, 112 S. Ct. at 2894 n.7 (citations omitted). It was unnecessary for the Court to address the denominator question in the *Lucas* case, however, because the regulations left each of the claimant's two beachfront lots without economic value.

The critical nature of the issue has been recognized by the Court since the watershed case of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 419, 43 S. Ct. 158, 161, 67 L. Ed. 322 (1922) (Brandeis, J. dissenting) ("But values are relative. If we are to consider the value of the coal kept in place by the restriction, we should compare it with the value of all other parts of the land."). *See Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 130, 98 S. Ct. 2646, 2662, 57 L. Ed. 2d 631 (1978) ("In deciding whether a particular governmental action has effected a taking, this Court focuses on the . . . extent of the interference with rights in the parcel as a whole"); *cf. Penn Central*, 438 U.S. at 149 n.13, 98 S. Ct. at 2672 n.13 (Rehnquist, C.J., dissenting) ("but the Court must define the particular property unit that should be examined"); *see also Keystone Bituminous Coal Ass'n*, 480 U.S. at 514-15, 107 S. Ct. at 1257 (Rehnquist, C.J. dissenting) ("The need to consider the effect of regulation on some identifiable segment of property makes all important the admittedly difficult task of defining the relevant parcel."). Yet, despite having recognized the fundamental importance of the

denominator question to the protection of Fifth Amendment rights decades ago, the Court has still not formulated an answer to this difficult question.

The circumstances of Petitioners' case will provide the Court with an extraordinary vehicle through which the Court can articulate a standard, or perhaps a rule, for use in the difficult task of defining the relevant parcel. Several aspects of this case make it particularly appropriate.

First, the denominator issue was dispositive of Petitioners' Fifth Amendment claims. The opinion of the Appellate Division adopted by the New Jersey Supreme Court recognized that, like the situation in *Lucas*, this case involves a categorical taking in which *all* economically beneficial use of the Riparian Parcel was prohibited by State regulation. Moreover, the appellate court realized that the outcome of the case depended entirely on the definition of the relevant parcel for takings purposes. The court conceded that if its analysis were limited to the Riparian Parcel alone, a compensable taking would result, whereas if the upland homesite was added to the equation, no taking would be found, presumably because the dwelling provided reasonable use.

Second, the factual circumstances of this case present a multiplicity of factors relevant to the analysis, some of which have been touched on by this Court in its brief discussions of the denominator question. In *Lucas*, the Court said that the answer:

> may lie in how the owner's reasonable expectations have been shaped by the State's law of property — i.e., whether and to what degree

> the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.

Lucas, 505 U.S. at 1016 n.7, 112 S. Ct. at 2894 n.7.[3]

Tidal lands have been given distinctive recognition and treatment by the common law and New Jersey statutory law for hundreds of years because of their special character and importance to commerce, *see City of Hoboken v. Pennsylvania R. Co.*, 124 U.S. 656, 690, 8 S. Ct. 643, 654, 31 L. Ed. 543 (1888). Thus, Petitioners' interest in the Riparian Parcel has an especially rich background of protection under state property law. *Cf. Kaiser Aetna v.*

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3. *See Phillips v. Washington Legal Foundation*, __ U.S. __, 118 S. Ct. 1925, 1930-32, 141 L. Ed. 2d 174 (1998) (Court looked to "traditional property interests" and "background principles of property law" when determining whether interest earned on IOLTA account was private property of client for purposes of taking analysis); *Keystone Bituminous Coal Ass'n*, 480 U.S. at 518-19, 107 S. Ct. at 1259-60 (Rehnquist, C.J. dissenting) ("we have evaluated takings claims by the units of property defined by state law"); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972) (property interests are not created by the Constitution; rather, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law"). *See also Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, __, 117 S. Ct. 1659, 1672, 137 L. Ed. 2d 980 (1997) (Scalia, J. concurring in part and concurring in judgment) (distinguishing analysis of *Penn Central* case and stating that the "relevant land, it could be said, was the aggregation of the owners' parcels subject to the regulation (or at least the contiguous parcels)").

United States, 444 U.S. 164, 166-67, 100 S. Ct. 383, 386, 62 L. Ed. 2d 332 (1979) (describing recognition of distinct interest in Hawaiian fishponds by traditional state property law and treating claimants' marina, but *not* the adjacent upland development, as relevant property unit for purposes of takings claim analysis).

Of particular significance here is the fact that the State of New Jersey itself created the property interest at issue, and shaped the landowner's expectations, by conveying a fee simple interest in submerged land with a covenant specifying that it could be used for only one purpose —construction of a pier — and nothing else. Subsequently, of course, it was the same State which prohibited construction of a pier, effectively prohibiting all productive use of the Riparian Parcel. While the circumstances of this case present many relevant factors, the basic factual picture remains clear and uncluttered. As a result, the Court's analytical task will be facilitated by the particularly appropriate qualities of Petitioners' case.

Finally, the state government's actions in this case are especially striking — what the State sold in 1924 it now has completely reclaimed without paying any compensation. The State agency responsible for riparian grants, and for issuing waterfront development permits, conveyed the subject tidal lands to Petitioners' predecessors in title for substantial monetary consideration. Almost seventy years later, the State took back the Riparian Parcel as shellfish habitat by requiring that the land be left in its natural state. Yet, the State has avoided paying just compensation by persuading the New Jersey Supreme Court to simply expand the relevant unit of property for takings analysis to include the adjacent upland lot containing the home, even though that parcel was not part of the initial State conveyance, and is not subject to the shellfish habitat regulations.

The Court has long recognized the critical importance of the denominator question. Now is the time for the Court to take the opportunity offered by this case to provide consistency, clarity and authority to the application of the Takings Clause of the Fifth Amendment, which, as the Chief Justice recently emphasized is "as much a part of the Bill of Rights as the First Amendment or Fourth Amendment." *Dolan v. City of Tigard*, 512 U.S. 374, 392, 114 S. Ct. 2309, 2320, 129 L. Ed. 2d 304 (1994).

II.

THERE EXISTS A CONFLICT AMONG STATE SUPREME COURTS AND STATE AND FEDERAL APPELLATE COURTS OVER THE APPROACH TO THE DENOMINATOR QUESTION

Various conflicting approaches to the denominator question have been developed and applied by appellate courts at the state and federal level. No single approach has gained currency, however, because there has been no authoritative ruling from this Court. The confusion has reached the point where even a thorough review of applicable precedents will not enable landowners or government regulators to make reasonable predictions as to the outcome of regulatory takings claims.

Several state appellate courts which have recently confronted the denominator question have undertaken an exhaustive review of the relevant caselaw only to conclude that there is little guidance to be drawn from precedent. *See East Cape May v. Dept. of Environmental Protection*, 300 N.J. Super. 325, 353, 693 A.2d 114, 128 (N.J. App. Div. 1997) (the cases "indicate the presently unsettled state

of New Jersey and Federal law on the question of how to determine the relevant 'property' for the purpose of deciding whether police power statutes or regulations . . . have deprived the owner of substantially all viable economic use of its property"); *see also Machipongo Land & Coal Co., Inc. v. Com., Dept. of Environmental Resources*, 719 A.2d 19, 26 (Pa. Cmwlth. 1998) (the courts "have addressed the problem of deciding how the denominator is determined in a regulatory takings case, but they have never agreed on the appropriate method for determining that portion of the fraction and have provided little in the way of guidance").

The conflicting approaches employed by state and federal courts thus far include: (1) the contiguous land under common ownership approach; (2) the unity of use approach; (3) a multi-factor analysis; and (4) the property interest affected by the regulation approach.[4] Reconciling these conflicting lower court rulings is a task reserved to this Court, and this case provides a good vehicle for accomplishing the task.

Many courts considering the composition of the denominator have relied almost exclusively on the factors of contiguity and common ownership.[5] For example, in *Zealy v.*

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4. *See generally* JOHN E. FEE, *Comment, Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535 (1994) (examining inconsistent approaches taken by courts to denominator question and proposing yet another alternative for resolving the question); MARK R. LISKER, *Regulatory Takings and the Denominator Problem*, 27 RUTGERS L.J. 663, 706-19 (1996) (examining various conflicting approaches taken by lower federal courts to the question).

5. *See* John E. Fee, *Comment*, 61 U. CHI. L. REV. at 1546 ("A common method of isolating a bundle of property interests for (Cont'd)

City of Waukesha, 201 Wis.2d 365, 548 N.W.2d 528 (1996), the claimant owned approximately 10.4 contiguous acres of land. A portion was zoned for business uses, a portion for residential use, and a portion was rezoned from residential use to create a conservancy district in which no development was permitted. The claimant argued that a taking had occurred as to the portion limited to conservation. In that case, where the availability of permitted uses clearly played a key role, the Wisconsin Supreme Court relied exclusively on the contiguous land under a common owner test to deny the takings claim. *Zealy*, 201 Wis.2d at 374-79, N.W.2d at 532-34.

By contrast, permitted uses were the driving force behind the Ninth Circuit's decision in *American Savings and Loan Ass'n v. Marin County*, 653 F.2d 364 (9th Cir. 1981). In examining whether two contiguous parcels under common ownership should be treated as separate for takings purposes, the Ninth Circuit framed the denominator question as: "whether the challenged ordinance creates two separate parcels for taking purposes by adopting different zoning designations for each parcel." *Id.* at 370. The regulation had isolated one of claimant's parcels into a unique zone of very low density residential use. According to the court, a "deprivation by a non-uniform ordinance of a portion of [claimant's] property which is substantial and otherwise

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(Cont'd)
regulatory takings analysis is to consider all contiguous property under a common owner as a single, indivisible parcel. This method of defining the relevant parcel, however, is more often an unstated assumption than a carefully chosen methodology. Indeed, a number of courts seem to have implicitly employed this uniformity-of-ownership definition without even evaluating the propriety of other rules.").

economically viable . . . tends to require that the zoning" of the two parcels be evaluated separately. *Id.* at 371.[6]

The Federal Circuit and Court of Claims have frequently used a multi-factor analysis when deciding the denominator question. *See, e.g., Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994) ("Our precedent displays a flexible approach, designed to account for factual nuances."). Courts employing this approach have analyzed a wide variety of factors such as: "the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, [and] the extent to which the protected lands enhance the value of remaining lands." *Ciampitti v. United States*, 22 Cl. Ct. 310, 318 (Cl. Ct. 1991); *see also Broadwater Farms Joint Venture v. United States*, 35 Fed. Cl. 232, 239 (Cl. Ct. 1996). Other factors employed include: the purpose of the imposition,

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6. *See also Zealy v. City of Waukesha*, 194 Wis.2d 701, 714, 534 N.W.2d 917, 922 (Ct. App. Wis. 1995), *rev'd*, 201 Wis.2d 365, 548 N.W.2d 528 (1996) (Wisconsin Court of Appeal framed the denominator question as "whether that part of the parcel unaffected by regulation is relevant to the anticipated use of the affected part of the parcel"); *Quirk v. Town of New Boston*, 140 N.H. 124, 130-31, 663 A.2d 1328, 1332-33 (1995) (holding that regulation which required buffer zone around campgrounds did not effect a taking because the two segments of the property had the same use, and noting that "focusing on a discrete portion of a larger tract may be appropriate where the land owner has fragmented the property for distinct development or uses"). *Cf. Town of Jupiter v. Alexander*, 1998 WL 634705, at *5-6 (Fla. App. 4 Dist. Sept. 16, 1998), *reh'g denied*, 1998 WL 813415 (Fla. App. 4 Dist. Nov. 12, 1998) (holding that claimant's two parcels, a mainland parcel fronting on a river and an island located 500 yards from the mainland parcel, should be considered a single tract for takings purposes because the parcels had a single unity of use).

the nature of the property, its alternative uses, and the extent to which all or only a portion of claimant's property was so limited. *See Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1172-73 (Fed. Cir.), *cert. denied*, 502 U.S. 952 (1991).

While several state courts seem to have adopted the multi-factor analysis approach, *see, e.g., K & K Construction, Inc. v. Department of Natural Resources*, 456 Mich. 570, 579-83, 575 N.W.2d 531, 536-38 (1998), *cert. denied*, 119 S. Ct. 60 (1998), the Michigan Supreme Court appears to have disavowed the Federal Circuit's *Loveladies Harbor* case, even though it employed the same multi-factor approach. *See Volkema v. Department of Natural Resources*, 457 Mich. 884, 586 N.W.2d 231 (1998) (result reached by court of appeals is correct but its "analysis, particularly its reliance on *Loveladies Harbor* . . . is disavowed insofar as it is inconsistent with this Court's decision in *K & K Construction*").

Finally, courts have treated the property interest defined by the regulation as the relevant unit for takings purposes. *See, e.g., Morris County Land Improvement Co. v. Parsippany-Troy Hills Township*, 40 N.J. 539, 193 A.2d 232 (1963) (treating only the portion of claimant's two contiguous parcels affected by regulation as the relevant parcel for takings purposes). Notably, the New Jersey Supreme Court's decision in the instant case directly conflicts with its earlier decision in *Morris County Land*.

In a recent case employing this approach, the owners of mineral rights challenged a Pennsylvania regulation designating certain portions of land within a watershed area as unsuitable for surface mining of coal. *Machipongo Land*,

supra, 719 A.2d at 22. The coal owners claimed a taking because they were deprived of all of their right to mine the coal. According to claimants, the relevant property unit for takings purposes was only the affected coal because Pennsylvania law has traditionally recognized coal as a separate estate in land. *Id.* at 23.[7] The court decided that, of three different approaches it had discerned in prior caselaw, a property-interest-affected-by-regulation approach was best to determine the denominator. The court concluded that only the regulated land, i.e., the separate estate in coal, would be considered in determining the denominator. *Id.* at 28.

Faced with this welter of conflicting precedent, neither landowner nor regulator (nor the courts for that matter) can adequately predict the outcome of a regulatory taking dispute. Yet, predictability is an essential attribute of the rule of law. According to Justice Holmes' well-known apothegm: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." OLIVER W. HOLMES, *The Path of the Law*, *in* COLLECTED LEGAL PAPERS 167, 173 (1920). Nothing short of a ruling by this Court can restore the necessary consistency, and consequent predictability, to lower court decisions applying the Fifth Amendment's Takings Clause to regulatory takings claims.

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7. The *Machipongo Land* case is remarkably similar to *Pennsylvania Coal Co., supra*, 260 U.S. 393 (1922) (Pennsylvania law restricting subsurface extraction of coal held to effect a taking of owners' separate interest in coal), and to the more recent case of *Keystone Bituminous Coal Ass'n, supra*, 480 U.S. 470 (1987) where the Court held that a nearly identical Pennsylvania law did not effect a taking. *Cf. Keystone Bituminous*, 480 U.S. at 515-20, 107 S. Ct. at 1257-60 (Rehnquist, C.J. dissenting).

The problem for lower state and federal courts is acute. Confronted by the "admittedly difficult" denominator question, lower courts can find little or no persuasive force in Takings Clause doctrine. Because there is almost no guidance to be gleaned from current precedents, the denominator question is decided anew in every forum, indeed, in every case. However, "the life of the law consists to a very large extent in the guidance both of officials and private individuals by determinate rules which, unlike the applications of variable standards, do *not* require from them a fresh judgment from case to case." H.L.A. HART, THE CONCEPT OF LAW 132 (1961); *see also* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921) ("adherence to precedent should be the rule and not the exception . . . the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him").

An authoritative ruling from this Court on the denominator question will resolve the conflict in the lower courts over this critical question of constitutional law. This case presents the Court with an extraordinary opportunity to make such a ruling.

CONCLUSION

The petition for a writ of certiorari should be granted to provide clarity and consistency to the application of the Takings Clause of the Fifth Amendment to regulatory takings claims through an authoritative ruling on the critical question of what constitutes the relevant property unit, a question long recognized as fundamentally important, yet not previously ruled upon, by this Court. The petition should also be granted to resolve the numerous conflicts among state and federal appellate courts over the proper method for resolving the denominator question.

Respectfully submitted,

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APPENDIX A — OPINION OF THE SUPREME COURT OF NEW JERSEY DATED AND DECIDED FEBRUARY 24, 1999

723 A.2d 943

EDMUND T. KARAM AND BARBARA KARAM, HUSBAND AND WIFE, PLAINTIFFS-APPELLANTS, AND PETER DIBIAGIO AND LAURA DIBIAGIO, HUSBAND AND WIFE, INTERVENORS-APPELLANTS, v. STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION, ROBERT C. SHINN, COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION, DEFENDANTS-RESPONDENTS, AND CHICAGO TITLE INSURANCE COMPANY, A CORPORATION, DEFENDANT.

Argued February 1, 1999 — Decided February 24, 1999.

On appeal from the Superior Court, Appellate Division, whose opinion is reported at 308 *N.J. Super.* 225, 705 *A.*2d 1221 (1998).

* * *

PER CURIAM.

The judgment is affirmed, substantially for the reasons expressed in Judge Baime's opinion of the Appellate Division, reported at 308 *N.J. Super.* 225, 705 *A.*2d 1221 (1998).

Appendix A

For affirmance — Chief Justice PORITZ and Justices HANDLER, POLLOCK, O'HERN, GARIBALDI, STEIN, and COLEMAN — 7.

Opposed — None.

APPENDIX B — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DATED AND DECIDED FEBRUARY 13, 1998

705 A.2d 1221

EDMUND T. KARAM AND BARBARA KARAM, H/W, PLAINTIFFS-RESPONDENTS, v. STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION, ROBERT C. SHINN, COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION, DEFENDANTS-APPELLANTS, AND CHICAGO TITLE INSURANCE COMPANY, A CORPORATION, DEFENDANT.

PETER DIBIAGIO AND LAURA DIBIAGIO, H/W, INTERVENOR-RESPONDENTS.

Superior Court of New Jersey
Appellate Division

Argued January 22, 1998 — Decided February 13, 1998.

* * *

Before Judges BAIME, WEFING, and BRAITHWAITE.

* * *

BAIME, P.J.A.D.

This is a regulatory taking case. In 1924, Charles and May Schweinert purchased from the State the riparian land

adjoining their upland property situated along the Manasquan River. Under the riparian grant, the tide-flowed land could only be used for construction of a dock or recreational pier. The grant required common ownership of the upland property and the riparian land. Although the Waterfront and Harbor Facilities Act of 1914 (*N.J.S.A.* 12:5-1 to -11), more commonly known as the Waterfront Development Act, was in effect at the time the riparian grant was issued and required State approval as a condition for improving the tide-flowed land, the Schweinerts never applied for a permit and never sought to erect a dock on their property. Plaintiffs purchased both the upland and riparian lands in 1993, and sometime thereafter applied to the Department of Environmental Protection (DEP) for a permit. By this time, however, the riparian land was designated a "special restricted area" because it harbored high densities of shellfish. Following the DEP's denial of their application for a development permit, plaintiffs brought this inverse condemnation action. The Chancery Division granted partial summary judgment in plaintiffs' favor and certified its order as final. The State appeals. We reverse.

I.

The salient facts are not in dispute. On May 19, 1924, the Board of Commerce and Navigation conveyed to the Schweinerts the riparian land adjoining their upland property, restricting its use to the erection of a pier or dock. Although the upland and riparian parcels have consistently been delineated as separate lots on the municipal tax map and in the various deeds executed over the years, the grant

required common ownership of the lands or the right to the tide-flowed property would become void.

Because the Waterfront Development Act was in place at the time the riparian grant was issued, a development permit was required as a condition for improving the tide-flowed property. The history of the regulatory framework promulgated under the Act is described at length in *Last Chance Development Partnership v. Kean*, 232 *N.J.Super.* 115, 556 *A.*2d 796 (App.Div.1989), *aff'd*, 119 *N.J.* 425, 575 *A.*2d 427 (1990), and need not be recited here. Ironically, the impetus for the statutory scheme came from the reports of the New Jersey Harbor Commission, a body appointed by Governor Woodrow Wilson, that recommended rapid and orderly development of the waterways to facilitate commerce and navigation. In the early 1970's, however, governmental focus shifted in favor of wildlife conservation and environmental protection. In 1973, the Legislature enacted the Coastal Area Facility Review Act (CAFRA), *see N.J.S.A.* 13:19-1 to -21, which, among other things, was designed to assure that any future development would be "reasonably consistent and compatible with the natural laws governing the physical, chemical and biological environment of the coastal area." *N.J.S.A.* 13:19-2. The DEP was empowered to adopt and amend rules and regulations to effectuate the purposes of the Act. *N.J.S.A.* 13:19-17. Pursuant to that authority, the DEP adopted *N.J.A.C.* 7:7E-3.2(d), which prohibits the construction of docks in certain classified waters.

In 1987, the Manasquan River was classified as a "special restricted area," meaning that it harbored moderate

to high densities of shellfish that were uncontaminated and fit for human consumption. *See N.J.A.C.* 7:12-1.2 and *N.J.A.C.* 7:12-3.2. In 1993, the DEP's Bureau of Shellfisheries again surveyed the Manasquan River and reached the same conclusion. Because the river serves as an active shellfish habitat, erection of a pier or dock in the tide-flowed land is prohibited.

Over the years, the Schweinerts subdivided their property along the river, always selling off the upland land with the riparian parcel to each purchaser. Before the river was classified as a "special restricted area," many of these property owners erected docks. Plaintiffs purchased the upland and riparian properties in 1993. Although the DEP's classification of the river as a "special restricted area" was a matter of public record at the time of the purchase, plaintiffs were unaware of the prohibition against the construction of docks. Relying on their riparian grant and the docks that had previously been erected on neighboring properties, plaintiffs applied for a development permit. On May 11, 1993, the DEP denied plaintiffs' application.

Plaintiffs brought this action. During the litigation, plaintiffs sold the upland and riparian lands for $1,100,000, conditioned upon their continued pursuit of this inverse condemnation claim. In a brief oral opinion, the Chancery Division granted plaintiffs' motion for partial summary judgment, finding that the DEP's denial of a development permit deprived the property owners of any viable economic use of the riparian grant. This appeal followed.

Appendix B

II.

We deal again with the complexities attendant to claims of inverse condemnation. Commonly, constitutional questions involve no more than a value judgment upon a factual complex rather than an evident application of a precise rule of law. Inevitably, resolution of such issues reflect the seasoning and experience of the one who judges, which in turn hinge upon the concerns and problems confronting the court when the issue is presented and decided. This observation is particularly compelling in the context of Fifth and Fourteenth Amendment "taking" jurisprudence, where the courts often engage in "ad hoc, factual inquiries," determining issues on a case-by-case basis. *Kaiser Aetna v. United States,* 444 *U.S.* 164, 175, 100 *S.Ct.* 383, 390, 62 *L.Ed.*2d 332, 343 (1979); *see also Gardner v. New Jersey Pinelands Comm'n,* 125 *N.J.* 193, 205, 593 *A.*2d 251 (1991) (application of takings principles requires "fact-sensitive" examination of the regulatory scheme and the extent to which it interferes with property rights and interests). The result is a welter of seemingly irreconcilable opinions, each seeking to alleviate the tension between the competing values involved. The problem is accentuated because decisions have been rendered over the meandering course of history, and societal concerns given priority by one generation are often considered of less consequence by the next. In resolving the issue before us, we tread upon uncertain and constantly shifting terrain.

Prior to Justice Holmes' opinion in *Pennsylvania Coal Co. v. Mahon,* 260 *U.S.* 393, 43 *S.Ct.* 158, 67 *L.Ed.* 322 (1922), "it was generally thought that the Takings Clause

reached only a 'direct appropriation' of property, *Legal Tender Cases,* 12 *Wall.* 457, 551, 20 *L.Ed.* 287 (1871), or the functional equivalent of a 'practical ouster of [the owner's] possession,' *Transportation Co. v. Chicago,* 99 *U.S.* 635, 642, 25 *L.Ed.* 336 (1879)." *Lucas v. South Carolina Coastal Council,* 505 *U.S.* 1003, 1014, 112 *S.Ct.* 2886, 2892, 120 *L.Ed.*2d 798, 812 (1992). Justice Holmes recognized in *Mahon* that if private property were subject to unbridled, uncompensated intrusion under the police power, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed]." 260 *U.S.* at 415, 43 *S.Ct.* at 160, 67 *L.Ed.* at 326. The principle was thus adopted that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Ibid.* But land use law teems with activity which every day touches the lives of millions, and there is no clear line of demarcation separating overly intrusive regulation that requires just compensation, and mild burdens adjusting the benefits of economic life that do not.

The question of what constitutes a "taking" for purposes of the Fifth Amendment "has proved to be a problem of considerable difficulty." *Penn Central Transp. Co. v. City of New York,* 438 *U.S.* 104, 123, 98 *S.Ct.* 2646, 2659, 57 *L.Ed.*2d 631, 648 (1978). The Supreme Court "has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government. . . ." *Ibid.* (citing *Goldblatt v. Town of Hempstead,* 369 *U.S.* 590, 594, 82 *S.Ct.* 987, 990, 8 *L.Ed.*2d 130, 133-34 (1962)).

Appendix B

In determining an appropriate analytical framework, we look first to the intendment of the "takings" clause. The purpose of this clause is "not to limit the governmental interference with property rights per se, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 *U.S.* 304, 315, 107 *S.Ct.* 2378, 2385-86, 96 *L.Ed.*2d 250, 264 (1987). Government action that works a taking implicates a "constitutional obligation to pay just compensation" to the property's owner. *Armstrong v. United States,* 364 *U.S.* 40, 49, 80 *S.Ct.* 1563, 1569, 4 *L.Ed.*2d 1554, 1561 (1960). Government may not compel a property owner alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. *Ibid.* But much, if not all, land use regulation adjusts the benefits and burdens of property ownership. *Penn Central Transp. Co. v. City of New York,* 438 *U.S.* at 124, 98 *S.Ct.* at 2659, 57 *L.Ed.*2d at 648. "Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon,* 260 *U.S.* at 413, 43 *S.Ct.* at 160, 67 *L.Ed.* at 325. Even in cases where the land use regulation causes some diminution in the value of an owner's property, the legislation "secures an 'average reciprocity of advantage' to everyone concerned," and government is under no obligation to pay compensation for the resulting reduction. *Lucas v. South Carolina Coastal Council,* 505 *U.S.* at 1018, 112 *S.Ct.* at 2894, 120 *L.Ed.*2d at 814 (quoting *Pennsylvania Coal Co. v. Mahon,* 260 *U.S.* at 415, 43 *S.Ct.* at 160, 67 *L.Ed.* at 326); *see Agins v. City of Tiburon,* 447 *U.S.* 255, 262, 100 *S.Ct.* 2138, 2142, 65

*L.Ed.*2d 106, 113 (1980). However, the functional basis for permitting government, by regulation, to affect property values without compensation "does not apply to the relatively rare situations where [the state] has deprived a landowner of all economically beneficial uses." *Lucas v. South Carolina Coastal Council,* 505 *U.S.* at 1018, 112 *S.Ct.* at 2894, 120 *L.Ed.*2d at 814. In such cases, the effect of the regulation may be likened to a direct invasion of the property or the practical ouster of the owner's possession. Thus, where government enacts legislation or adopts a regulation that denies an owner substantially all economic use of his or her land, a taking has occurred and the property owner must be compensated. *Id.* at 1028-29, 112 *S.Ct.* at 2900, 120 *L.Ed.*2d at 820-21; *see also Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.,* 452 *U.S.* 264, 297 n. 40, 101 *S.Ct.* 2352, 2371 n. 40, 69 *L.Ed.*2d 1, 29 n. 40 (1981); *Agins v. City of Tiburon,* 447 *U.S.* at 262, 100 *S.Ct.* at 2142, 65 *L.Ed.*2d at 113.

In order to determine what was "taken" by the force of a statute or regulation, one must know what the property owner had originally. Stated differently, the antecedent inquiry into the nature of the owner's estate accords with our "takings" jurisprudence "which has traditionally been guided by the understandings of our citizens regarding the content of . . . the 'bundle of rights' that they acquire when they obtain title to property." *Lucas v. South Carolina Coastal Council,* 505 *U.S.* at 1027, 112 *S.Ct.* at 2899, 120 *L.Ed.*2d at 820. This inquiry raises the issue that cases and legal commentators have described as the problem of defining the "denominator." In *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 *U.S.* 470, 497, 107 *S.Ct.* 1232,

1248, 94 *L.Ed.*2d 472, 496 (1987), the Supreme Court explained that "[b]ecause our test for regulatory taking requires [comparison of] the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.' " (quoting Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 *Harv. L.Rev.* 1165, 1192 (1967)). We will return to this subject later in our opinion. But here, we are concerned with the broader concept of property ownership — the sticks that make up the "bundle of rights" acquired by the owner when property is conveyed to him. In determining the effect of a statute or regulation on an owner's property rights, we look to whether the regulatory action interferes with the owner's "distinct investment-backed expectations" and to what extent such expectations were reasonable. *Penn Central Transp. Co. v. City of New York,* 438 *U.S.* at 124, 125, 98 *S.Ct.* at 2659, 57 *L.Ed.*2d at 648. We also look to whether the economic "right" allegedly destroyed by the regulation was vested in the owner or within the power of the State to regulate under the common law nuisance doctrine. *See Lucas v. South Carolina Coastal Council,* 505 *U.S.* at 1029, 112 *S.Ct.* at 2900, 120 *L.Ed.*2d at 821.

To recapitulate, in determining whether an owner's property has been "taken," we are to consider: (1) whether the regulation has deprived the owner of virtually all economically viable uses of the property, (2) whether the property owner had any distinct investment-backed expectations at the time of acquiring the property that were

destroyed by the force of the regulation, and (3) whether the interest claimed to have been "taken" was vested with the owner, as a matter of state property law, and not within the power of the State to regulate under common law nuisance. Here, the DEP does not claim that the proposed use of the riparian land, erection of a dock, constitutes a common law nuisance that may be proscribed by the State. Thus, our inquiry focuses on the first two factors.

A.

We first consider the economic impact of the denial of the development permit. As stated above, the mere diminution of land value itself does not constitute a taking. *Gardner v. New Jersey Pinelands Comm'n,* 125 *N.J.* at 210, 593 *A.*2d 251. Likewise, impairment of the marketability of land alone does not effect a taking. *Ibid.* Also, restrictions on uses do not necessarily result in takings even though they reduce income or profits. *Ibid.; see also Southern Burlington County NAACP v. Township of Mount Laurel,* 92 *N.J.* 158, 273 and n. 34, 456 *A.*2d 390 (1983). A regulatory scheme will be upheld against a claim of inverse condemnation "unless it denies 'all practical use' of property, or 'substantially destroys the beneficial use of private property,' or does not allow an 'adequate' or 'just and reasonable' return on investment." *Gardner v. New Jersey Pinelands Comm'n,* 125 *N.J.* at 211, 593 *A.*2d 251 (citations omitted). "[O]ur courts have applied the standard that focuses on the beneficial or economic uses allowed to a property in the context of particularized restraints designed to preserve the special status of distinctive property and sensitive environmental regions." *Ibid.* (citing *In re Egg*

Harbor Assocs., 94 *N.J.* 358, 464 *A.*2d 1115 (1983); *Spiegle v. Borough of Beach Haven*, 46 *N.J.* 479, 218 *A.*2d 129, *cert. denied*, 385 *U.S.* 831, 87 *S.Ct.* 63, 17 *L.Ed.*2d 64 (1966); *Orleans Builders & Developers v. Byrne*, 186 *N.J.Super.* 432, 453 *A.*2d 200 (App.Div.1982); *In re Loveladies Harbor, Inc.*, 176 *N.J.Super.* 69, 422 *A.*2d 107 (App.Div.1980), *certif. denied*, 85 *N.J.* 501, 427 *A.*2d 588 (1981); *New Jersey Builders Ass'n v. Department of Envtl. Protection*, 169 *N.J.Super.* 76, 404 *A.*2d 320 (App.Div.), *certif. denied*, 81 *N.J.* 402, 408 *A.*2d 796 (1979); *Toms River Affiliates v. Department of Envtl. Protection*, 140 *N.J.Super.* 135, 355 *A.*2d 679 (App.Div.), *certif. denied*, 71 *N.J.* 345, 364 *A.*2d 1077 (1976); *Sands Point Harbor, Inc. v. Sullivan*, 136 *N.J.Super.* 436, 346 *A.*2d 612 (App.Div.1975)).

Classification of the tide-flowed land as a "special restricted area" with the consequent denial of a development permit clearly destroys the only beneficial use of plaintiffs' riparian land. The terms of the riparian grant are clear — "[the] land . . . is not to be used for any purpose whatsoever except the erection of a pier. . . ." The effect of the regulatory scheme, therefore, is to sacrifice all economically beneficial uses in the riparian grant in the name of the common good. Were we to consider the riparian grant alone as the property interest against which the loss of value is to be measured, we would be obliged to sustain plaintiffs' claim of inverse condemnation because the effect of the regulation is to compel the property owners to leave the tide-flowed land entirely idle. Conversely, were we to consider the upland and riparian parcels as a single unit of property against which the loss of value is to be measured, we would be required to reject plaintiffs' claim of inverse

condemnation because the effect of the regulation is merely to destroy a somewhat minor "strand" or "stick" in plaintiffs' overall bundle of rights. *See Andrus v. Allard*, 444 *U.S.* 51, 65-66, 100 *S.Ct.* 318, 327, 62 *L.Ed.*2d 210, 222-23 (1979). We are thus faced with the "denominator" problem to which we alluded earlier. More specifically, the critical question is "how to define the unit of property 'whose value is to furnish the denominator of the fraction.' " *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 *U.S.* at 497, 107 *S.Ct.* at 1248, 94 *L.Ed.*2d at 496.

The question has received somewhat uneven treatment in our reported opinions. In *Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills*, 40 *N.J.* 539, 542, 193 *A.*2d 232 (1963), the plaintiff owned a large tract of land. The undeveloped wetlands portion was located in Parsippany-Troy Hills, and the adjoining developed land was located in neighboring Hanover. *Ibid.* The portion of the plaintiff's property in Parsippany-Troy Hills was subject to a zoning classification which precluded any viable use of the wetlands property. *Id.* at 543-44, 193 *A.*2d 232. The Court held that this zoning scheme, if unmodified, would constitute a taking of private property requiring fair compensation. *Id.* at 554-57, 193 *A.*2d 232. In reaching this conclusion, the Court clearly assumed that the property unit against which the loss was to be measured was only the undeveloped land situated in Parsippany-Troy Hills. The Court neither considered nor discussed the larger adjoining property located in Hanover. Subsequent decisions have questioned whether *Morris County Land Improvement Co.* remains good law in all respects. *See Gardner v. New Jersey Pinelands Comm'n*, 125 *N.J.* at

213-14, 593 *A.*2d 251; *AMG Assocs. v. Township of Springfield,* 65 *N.J.* 101, 112 n. 4, 319 *A.*2d 705 (1974).

Without alluding to the "denominator" problem in *American Dredging Co. v. Department of Environmental Protection,* 169 *N.J.Super.* 18, 404 *A.*2d 42 (App.Div.1979), and *In re Lovcladies Harbor, Inc.,* 176 *N.J.Super.* 69, 422 *A.*2d 107, we assumed, without discussion of the question, that the fractional denominator should include all of the contiguous acreage under a single ownership. We last discussed this issue in *East Cape May Associates v. Department of Environmental Protection,* 300 *N.J.Super.* 325, 693 *A.*2d 114 (App.Div.1997). Writing for the court, Judge Brochin analyzed the relatively few decisions that have considered the subject, characterizing the present law as largely "unsettled." *Id.* at 353, 693 *A.*2d 114. Because the record was inadequate, we reached no conclusions, but instead remanded the matter for further development of the facts. *Ibid.* In the course of our opinion, we posed a lengthy list of questions noting that the answers might be helpful in "the formulation of [a] rule" to determine the property unit against which the owner's loss could be measured. *Id.* at 354, 693 *A.*2d 114. Most of these questions were fact-specific to East Cape May's claim of inverse condemnation. Suffice it to say that the information we sought pertained to the history of the ownership and development of the property.

This was in accord with the decisions of other jurisdictions which have generally considered the composition of the denominator of the taking fraction as consisting of all of the claimant's contiguous acreage in

the same ownership. *See, e.g., Jentgen v. United States,* 228 *Ct.Cl.* 527, 657 *F.*2d 1210 (1981), *cert. denied,* 455 *U.S.* 1017, 102 *S.Ct.* 1711, 72 *L.Ed.*2d 134 (1982); *Deltona Corp. v. United States,* 228 *Ct.Cl.* 476, 657 *F.*2d 1184 (1981), *cert. denied,* 455 *U.S.* 1017, 102 *S.Ct.* 1712, 72 *L.Ed.*2d 135 (1982); *Zealy v. City of Waukesha,* 201 *Wis.*2d 365, 548 *N.W.*2d 528 (1996). This is not the universal rule. Several decisions have held that the denominator of the taking fraction is the portion of the property subject to the confiscating regulation. *See, e.g., Loveladies Harbor, Inc. v. United States,* 28 *F.*3d 1171 (Fed.Cir.1994); *Florida Rock Indus., Inc. v. United States,* 18 *F.*3d 1560 (Fed.Cir.1994), *cert. denied,* 513 *U.S.* 1109, 115 *S.Ct.* 898, 130 *L.Ed.*2d 783 (1995); *K & K Constr., Inc. v. Department of Natural Resources,* 217 *Mich.App.* 56, 551 *N.W.*2d 413 (Mich.Ct.App.1996), *appeal granted,* __ *Mich.* __, 562 *N.W.*2d 788 (1997); *Volkema v. Department of Natural Resources,* 214 *Mich.App.* 66, 542 *N.W.*2d 282 (Mich.Ct.App.1995), *appeal held in abeyance,* __ *Mich.* __, 562 *N.W.*2d 789 (1997). However, these cases involved large tracts of acreage that had been segmented into smaller parcels for development at different times, and either because of the configuration of the property or its history, the divided parcels had been considered as separate and distinct entities or units. Applying a "flexible approach, designed to account for such factual nuances," *Loveladies Harbor, Inc. v. United States,* 28 *F.*3d at 1181, the respective courts found it logical to treat each parcel separately for determining whether the particular regulation affected a "taking" requiring just compensation. *See Quirk v. Town of Boston,* 140 *N.H.* 124, 130-31, 663 *A.*2d 1328, 1332-33 (1995).

Appendix B

Recognizing the fact-sensitive question before us, we are convinced that the adjoining upland and riparian lands must be considered a single property unit. As we noted earlier, the riparian grant requires that the uplands and tide-flowed property be commonly owned. Indeed, the riparian grant was contingent upon common ownership and was to be "voided" or forfeited if the contingency was not satisfied. Moreover, the right permitted under the riparian grant, the erection of a dock, was a mere incident to use of the upland property. So too, as the Schweinert tract was subdivided over the years, the upland and riparian properties were always bought and sold as a single unit. Plaintiffs purchased both properties in a single contract of sale, and sold the land to the present owners as a single unit. Finally, the properties are assessed for tax purposes as a single lot. In both law and fact, the properties are inextricably intertwined. We, thus, conclude that the Chancery Division erred when it considered the riparian land as a separate parcel, wholly distinct from the uplands portion.

Viewing the uplands and tide-flowed lands as a single property, it is apparent that denial of the development permit did not effect a taking. While plaintiffs contend that the riparian grant should be considered separate and distinct, they concede that no taking occurred, if the upland and tide-flowed lands are considered the "property unit" upon which the effect of the regulation is to be measured.

B.

For the sake of completeness, we next consider whether plaintiffs had a reasonable investment-backed expectation

that was destroyed by the denial of the development permit. Whether or not the property owner's expectations are reasonable "depend to a significant extent on whether [he] had notice in advance of [his] investment decision that the governmental regulations . . . had been or would be enacted." *East Cape May Assocs. v. Department of Envtl. Protection,* 300 *N.J.Super.* at 337, 693 *A.*2d 114.

We first consider the nature of the property that was the subject of the riparian grant. Under the public trust doctrine, "ownership of and dominion and sovereignty over lands covered by tide waters . . . belong to the respective states within which they are found. . . ." *Illinois Central R.R. Co. v. Illinois,* 146 *U.S.* 387, 435, 13 *S.Ct.* 110, 111, 36 *L.Ed.* 1018, 1036 (1892). Although the states have the inherent authority to convey riparian grants to private persons, *see Borough of Neptune City v. Borough of Avon-by-the-Sea,* 61 *N.J.* 296, 303-05, 294 *A.*2d 47 (1972), the sovereign never waives its right to regulate the use of public trust property. *Illinois Central R.R. Co. v. Illinois,* 146 *U.S.* at 453, 13 *S.Ct.* at 118, 36 *L.Ed* at 1042; *see also Contributors to Pennsylvania Hosp. v. City of Philadelphia,* 245 *U.S.* 20, 38 *S.Ct.* 35, 62 *L.Ed.* 124 (1917).

It is thus plain that the 1924 riparian grant from the State to the Schweinerts did not create an absolute and perpetual right to construct a dock, free from all legislative and regulatory intervention. Indeed, as we pointed out earlier, the Waterfront Development Act was in place at the time the Schweinerts acquired the riparian grant. Although the focus of the regulatory scheme adopted under the Act shifted from development to preservation, the State

plainly had "reserve powers" to alter or change the law, even after making the covenant with the Schweinerts. *See A.P. Smith Mfg. Co. v. Barlow*, 26 *N.J. Super.* 106, 123-24, 97 *A.*2d 186 (Ch.Div.), *aff'd*, 13 *N.J.* 145, 98 *A.*2d 581 (1953). And clearly, the State's emerging policy with respect to shellfish protection fell within its police powers under the public trust doctrine. *See In re Loveladies Harbor, Inc.*, 176 *N.J.Super.* at 77, 422 *A.*2d 107.

We stress that the prohibition against the erection of docks along the Manasquan River was a matter of public record long before plaintiffs purchased the property. The prohibition was expressly set forth in a published regulation. Specifically, *N.J.A.C.* 7:12-2.1(a)(5) and *N.J.A.C.* 7:12-3.2(a) denominate the area in which plaintiffs' property is situated as a "special restricted area." *N.J.A.C.* 7:7E-3.2(d) proscribes the construction of a dock in waters so classified.

Beyond this, the DEP's regulations provide a pre-application review process under which parties can obtain an initial determination even before applying for a development permit. *See N.J.A.C.* 7:7-3. Plaintiffs never availed themselves of this right.

The crucial fact is that since the early 1970's the regulatory jurisdiction of the DEP has substantially expanded and the substantive criteria necessary for granting a development permit has significantly stiffened. The decision to shift public policy from commerce to environmental protection and wildlife preservation was not made by a faceless bureaucrat somewhere within the administrative labyrinth of a nameless office building in

Trenton. Instead, it was articulated by our Legislature in carefully crafted enactments and heralded by the Governor with great fanfare. Plaintiffs must be held to have had constructive notice of these developments.

We recognize that rights in property pass from one owner to the next. Thus, the right of a property owner to fair compensation when his property is zoned into inutility by changes in the zoning law passes to the next owner despite the latter's knowledge of the impediment to development. *See Urban v. Planning Board of Manasquan,* 124 *N.J.* 651, 592 *A.*2d 240 (1991); *Moroney v. Mayor and Council of Old Tappan,* 268 *N.J.Super.* 458, 633 *A.*2d 1045 (App.Div.1993), *certif. denied,* 136 *N.J.* 295, 642 *A.*2d 1004 (1994). But plaintiff's predecessors in title, the Schweinerts, never had the absolute right to construct a dock; it was always conditioned on the requirement of obtaining a development permit. While the conditions for obtaining a development permit have undoubtedly become more onerous in the seventy-odd years that have passed since the riparian grant was issued, plaintiffs could not have reasonably expected that they would be immune from all changes in the law during that period.

We are thus convinced that the Chancery Division erred by granting partial summary judgment. We thus reverse the judgment and remand the matter to the Chancery Division.

WEFING, J.A.D., concurring.

I concur in the result reached by my colleagues and fully subscribe to their view that "the adjoining upland and

riparian lands must be considered a single property unit" and that "[i]n both law and fact, the properties are inextricably intertwined." (Op. at 239). At the oral argument of this matter, both parties agreed that our resolution of that single issue would be dispositive. I share that assessment and thus find it unnecessary to consider the additional question of whether plaintiffs had a reasonable investment-backed expectation that was destroyed by the refusal of the DEP to issue a permit for the construction of a dock or pier.

APPENDIX C — ORDER OF THE SUPERIOR COURT OF NEW JERSEY, MONMOUTH COUNTY, LAW DIVISION DENYING MOTION FOR RECONSIDERATION DATED AND FILED NOVEMBER 13, 1996

PETER VERNIERO
Attorney General of New Jersey
Attorney for Defendant
Department of Environmental Protection
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By: Alyssa Pearlman Wolfe
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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – MONMOUTH COUNTY
DOCKET NO. L-4960-95

Civil Action

EDMUND T. KARAM and BARBARA KARAM, h/w,

Plaintiffs,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION; ROBERT C. SHINN, Commissioner of the Department of Environmental Protection; and CHICAGO TITLE INSURANCE COMPANY, a Corporation,

Defendants.

Appendix C

ORDER DENYING MOTION FOR RECONSIDERATION

This matter having been opened to the Court by Peter Verniero, Attorney General of New Jersey, by Alyssa Pearlman Wolfe, Deputy Attorney General, appearing, upon the State's Motion for Reconsideration, and Richard M. Hluchan, Esquire, attorney for Plaintiffs, appearing in opposition, and the court having considered the motion papers, briefs, and affidavits of the parties, and having heard the argument of counsel, and for good cause, and for the reasons set forth on the record in open court, it is hereby

ORDERED this 13th day of November, 1996, that:

1. The State's Motion for Reconsideration of the court's previous Order, dated August 23, 1996, granting summary judgment in favor of Plaintiffs as to Counts II and III of the Complaint, is hereby denied;

2. The court's previous Order dated August 23, 1996, is hereby supplemented as follows:

a. The property taken by Defendant State of New Jersey, Department of Environmental Protection, is described in the Deed as Tract Two (2) and on the tax map as Lot 5.01, Block 99.03 in the Borough of Brielle, Monmouth County, New Jersey;

b. The date the taking occurred is June 25, 1995, the date the Commissioner of the Department of Environmental Protection issued a final decision

affirming the denial of the waterfront development permit;

c. The appointment of condemnation commissioners shall be stayed pending any appeal. Moreover, Counts I, IV, and V of the Complaint shall be stayed pending any appeal.

3. Pursuant to *R.* 4:42-2, it is hereby certified that the court's Order of August 23, 1996, insofar as it granted summary judgment in favor of Plaintiffs as to Counts II and III of the Complaint, is a final judgment which is appealable to the Superior Court, Appellate Division.

4. Pursuant to NJSA 20:3-26(c), the Court may order Defendant to pay Plaintiffs' reasonable attorney's fees upon the submission of an affidavit describing services rendered. This provision is without prejudice to Defendant's position that no further attorney's fees are to be awarded for the valuation proceedings, and is also without prejudice to Plaintiffs' position that *N.J.S.A.* 20:3-26(c) entitles them to attorney's fees for this entire matter, including the valuation proceeding.

s/ Patrick J. McGann, Jr.
Patrick J. McGann, Jr., J.S.C.

APPENDIX D — ORDER OF THE SUPERIOR COURT OF NEW JERSEY, MONMOUTH COUNTY, LAW DIVISION GRANTING PARTIAL SUMMARY JUDGMENT AS TO LIABILITY ON COUNTS II AND III OF THE COMPLAINT DATED AND FILED AUGUST 23, 1996

LEVIN & HLUCHAN, P.C.
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Attorneys for Plaintiffs, Edmund T. Karam and Barbara Karam

SUPERIOR COURT OF NEW JERSEY
MONMOUTH COUNTY
LAW DIVISION

CIVIL ACTION

DOCKET NO. L-4960-95

EDMUND T. KARAM, and BARBARA KARAM, husband and wife,

Plaintiffs,

v.

Appendix D

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION; ROBERT C. SHINN, Commissioner of the Department of Environmental Protection; and CHICAGO TITLE INSURANCE COMPANY, a Corporation,

Defendants.

ORDER GRANTING PARTIAL SUMMARY JUDGMENT AS TO LIABILITY ON COUNTS II AND III OF THE COMPLAINT

This matter having been opened to the Court by Levin & Hluchan, P.C., attorneys for Plaintiffs Edmund T. Karam and Barbara Karam, on a Motion for Partial Summary Judgment, and the Court having considered the motion papers, briefs, and affidavits of the parties, and having heard the argument of counsel, and for good cause, it is hereby

ORDERED this 23rd day of August, 1995 that Summary Judgment is hereby granted as to liability on Counts II and III of the Complaint in favor of plaintiffs and against defendant New Jersey Department of Environmental Protection based on the Court's finding that the denial of the Karams' waterfront development permit application constitutes a "taking" as a matter of law as to the Karams' riparian land;

IT IS FURTHER ORDERED that this matter shall be submitted to Condemnation Commissioners for a determination of damages pursuant to *N.J.S.A.* 20:3-12(b); and

Appendix D

IT IS FURTHER ORDERED that plaintiffs shall serve a copy of this Order on all other parties within 7 days of receipt of this Order by plaintiffs' counsel.

s/ Patrick J. McGann, Jr.
J.S.C.

APPENDIX E — FINAL DECISION OF THE STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION DATED JUNE 22, 1995

State of New Jersey
Department of Environmental Protection

Christine Todd Whitman
Governor

Robert C. Shinn, Jr.
Commissioner

OAL DOCKET NO. ESA 8879-93
AGENCY DOCKET NO. WFD-1308-93-0005.1

EDMUND KARAM,

Petitioner,

v.

DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

FINAL DECISION

The Initial Decision of Administrative Law Judge Joseph F. Fidler, dated April 27, 1995, is affirmed for the reasons stated therein. This denial, however, is without prejudice to Petitioner's right to reapply for a permit in the future should the Shellfish Habitat policy be modified in light of the results of the Department's ongoing efforts to study the effect of residential docks on shellfish.

Appendix E

Dated: 6/22/95

s/ Robert C. Shinn
Robert C. Shinn, Commissioner
Department of Environmental
Protection

APPENDIX F — INITIAL DECISION OF THE STATE OF NEW JERSEY, OFFICE OF ADMINISTRATIVE LAW DATED AND DECIDED APRIL 27, 1995

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. ESA 8879-93
AGENCY DKT. NO. WFD-1308-93-0005.1

EDMUND KARAM,

Petitioner,

v.

DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

INITIAL DECISION

* * *

Record Closed: January 27, 1995
Decided: April 27, 1995

BEFORE **JOSEPH F. FIDLER,** ALJ:

STATEMENT OF THE CASE

Edmund Karam ("petitioner") seeks to construct a wooden dock, including 936 square feet over the water on

riparian land in the Manasquan River, in Brielle, New Jersey. He has appealed from a denial of his application for a waterfront development permit under the Waterfront and Harbor Facilities Act, *N.J.S.A.* 12:5-3 (the "Act"). The Department denied the application on the grounds that the proposed project did not comply with the rules governing development within shellfish beds (now, "shellfish habitat") as set forth at *N.J.A.C.* 7:7E-3.2 and *N.J.A.C.* 7:12-2.1(a)1ii.

PROCEDURAL HISTORY

In February 1993, petitioner applied for a waterfront development permit. On May 11, 1993, the Department of Environmental Protection ("DEP") denied the application. The matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to *N.J.S.A.* 52:14-F-1 to -13, on September 20, 1993. Administrative Law Judge Beatrice S. Tylutki conducted an early settlement conference on April 6, 1994, but no settlement was reached. The matter was thereafter assigned to me for hearing.

Petitioner moved for summary decision, contending that he has the right to construct a pier as a matter of law, and he sought an order directing the Department of Environmental Protection ("DEP") to permit construction of the pier on his riparian land. By Order entered December 14, 1994, the motion was denied.[1] The hearing was then

1. In his post-hearing submissions, the petitioner renewed arguments raised in the motion for summary decision. For ease of reference, the pertinent portion of the Order Denying Summary Decision appears here as an appendix.

held as scheduled on December 16 and 19, 1994, at Mercerville, New Jersey. The record remained open after the hearing to allow the parties to submit post-hearing briefs. The last of these was received on January 27, 1995, and the record closed on that date. An order extending the time for issuance of this Initial Decision was subsequently entered.

FINDINGS OF FACT

Some of the material facts in this matter were previously set forth in the parties' papers on the motion for summary decision. All of the facts necessary to resolve this case are essentially undisputed. Edmund and Barbara Karam own Lots 5 and 5.01, known as 926 Cole Drive in Brielle, having purchased the land on January 7, 1993 (Exhibit P-1). Lot 5, which fronts on the Manasquan River, contains an existing single family home. Lot 5.01 is riparian land, most of which is below the mean high water line of the river. This lot measures approximately 118 feet wide, and varies in its other dimension from 230 feet on the East side to 290 feet on the West.

The Karams' title to the riparian land is based upon a May 19, 1924 riparian grant issued by the State of New Jersey to their predecessors in title, Charles and May Schweinert (Exhibit P-2). The Schweinerts paid $5,301.00 for the conveyance of 523.681 square feet, or approximately 12 acres, of riparian land. The portion of this conveyance which the petitioner purchased constitutes approximately 30,680 square feet. By the terms of the riparian grant, the grantees were given the right to fill the riparian land up to the bulkhead line. The only use of the riparian land which

the grant permitted beyond the bulkhead line was construction of a pier. A license or grant of riparian land in front of the pierhead line could be given to other parties, as long as the Schweinerts' access to the Manasquan River remained unimpeded. The grant states:

> And also under like term, covenants, conditions and limitations, all and singular the lands under water lying between the exterior line for solid filling and the exterior line for piers, as fixed by the Board of Commerce and Navigation appointed under the authority of the act aforesaid, and bounded by easterly and westerly lines of the first described tract extending southwardly to said line; but said last land described is not to be used for any purposes whatsoever except erection of a pier or piers thereon, underneath which the tide may ebb and flow and no solid filling shall be placed thereon.

Edmund Karam testified that he loves the water and boats, and he has spent summers in the Manasquan River area for about twenty years. He would like to upgrade the house in Brielle and make it his permanent residence. According to Mr. Karam, the riparian grant for the property was critical to his purchase. He understood after reading the grant and receiving legal advice that he would have no difficulty building a dock. In addition, Mr. Karam estimated that seven or eight of his closest ten neighbors have docks, so this also led him to conclude that having his own dock would not be a problem (Exhibit P-7). If he had any question about being able to build a dock, he would not have purchased the property.

Appendix F

Mr. Karam keeps his two boats moored in the water the entire boating season (Exhibit P-6). He has had his engineer prepare plans showing the proposed dock and mooring piles on both the East and West sides of the riparian grant (Exhibits P-4 and P-5). It was Mr. Karam's testimony that he prefers the plan for the dock to the East. However, he felt the Department might accept the plan for the dock on the West side, which would put it very close to his neighbor's dock, if the Department were worried about contamination. That area would already be contaminated anyway.

Environmental consultant Joseph Lomax testified as an expert on shellfish and coastal ecology. His resume was admitted into evidence as Exhibit P-8. Using the 1994 State of New Jersey *Shellfish Growing Water Classification Charts* (Exhibit P-9), Mr. Lomax located the petitioner's property on Chart 3 and determined the shellfish growing water classification for his vicinity on the Manasquan River to be "special restricted." West of the Route 70 bridge, the water classification is "prohibited." Special restricted and prohibited are both classifications for waters condemned for the harvesting of oysters, clams, and mussels. However, the Department may approve applications for removal of shellfish to be used for human consumption from areas classified as special restricted, for transplant, transfer, relaying, and depuration/controlled purification.

Mr. Lomax conducted a survey of the petitioner's riparian property following procedures described in the May 1991 *Shellfish Survey Guidelines for New Jersey* (Exhibit P-10). He obtained the necessary permits and notified the

appropriate authorities upon initiating the survey. According to Mr. Lomax, he utilized both the grab sample method for locating juvenile clams and the bottom raking method for locating adult clams. He described at length his method of sampling from 30 different points. Figure 4 of his Field Survey report (Exhibit P-11) shows the sampling points where he found clams and those where he did not. Mr. Lomax noted that the more sandy the substrate, the fewer the clams found. He found 19 clams by raking, and he calculated their density as .08 adult clams per square foot. By his grab sample, Mr. Lomax calculated the density for juvenile clams to be .19 per square foot. His estimate of the overall density of clams for the entire riparian grant was 11 clams per square foot. He acknowledged that where it is shown on his chart that he found no clams, that means only that he found none and not that there are none. He also candidly acknowledged that in the central and southern portions of the study site, there is a hard clam habitat. Mr. Lomax concluded that there was no hard clam habitat in the northern area, closest to the shore.

It was the testimony of Mr. Lomax that the Department approved construction of a 230 foot by 6 foot dock on the property next door to petitioner in 1987 (Exhibit P-13). This dock is located in a riparian grant with the same predecessor as petitioner's. According to Mr. Lomax, the Department's shellfish policy was substantially the same in 1987 as it was when petitioner's application for a permit to build his dock was denied. Mr. Lomax also noted that the mooring of boats, as petitioner has been doing, results in a prohibited status for the water. He opined that construction of a dock would therefore not result in a change in the status; it would

just change the modality of the prohibition. Mr. Lomax testified that he included a land use map in his field survey, which shows that there are many docks dotting the shoreline of the Manasquan River (Exhibit P-11). It was his opinion that there would be no significant incremental increase in adverse effect from construction of petitioner's dock, particularly because the area is already grossly degraded, and also because the area has good tidal flushing. According to Mr. Lomax, a study has indicated that where there is excellent tidal flushing, the impact of a dock would be absolutely minimal for shellfish.

Environmental Scientist Robert Scro testified for the Department as an expert on the influence of marine construction on water quality as it relates to shellfish. His *curriculum vitae* was admitted into evidence as Exhibit R-3. His office, the Division of Science and Research, Bureau of Marine Water Classification and Analysis, classifies the shellfish water quality at the petitioner's site as moderately polluted. This resulted in the special restricted designation. According to Dr. Scro, such water quality is sufficient to support a community of shellfish, and he noted that the water quality in the vicinity of petitioner's property has historically been so sufficient. However, the clams would not now be fit for consumption directly from those waters, but would be eligible for a hard clam relay and eventual purification.

Dr. Scro testified that when a dock is constructed, the water under it is automatically condemned and reduced to "prohibited" status. Since construction which downgrades water quality from special restricted to prohibited status

(both are condemned waters) is prohibited, the Department recommended denial of petitioner's application. In terms of contamination, docks and boats can leach toxic substances into the water, and these substances can be taken into shellfish through bio-accumulation. Pressure treated lumber leaches copper chromium and arsenic. The bottom paint on boats can be toxic, and boats also are the source of hydrocarbon and fecal coliform pollution. According to Dr. Scro, experts in the field of water quality have concluded that the incremental adverse impact from construction of an individual dock is real. The cumulative effect of dock construction may be a downgrading of the area water quality to prohibited. Dr. Scro described the petitioner's area as compromised, and suggested that there may be a downgrading if pollution controls on the Manasquan River are not enhanced. He noted that his agency approves 94% of the applications it receives for construction of single docks, and the remaining 6% are denied because of shellfish impacts.

Dr. Scro acknowledged that no one is legally shellfishing on the Manasquan River at the present time. However, nothing would prevent an interested person from applying for permission to conduct a hard clam relay program from the petitioner's section of the river. The last such permit was issued in 1988. Dr. Scro concluded that the commercial value of shellfish harvesting in the Manasquan River since that year has been zero dollars.

Assistant Fisheries Biologist Jeffrey Normant testified concerning the shellfish survey of petitioner's site which he conducted for the Department on April 30, 1993. He has

conducted about 30 such surveys involving private dock applications, and has done about 100 for lease bed permits. After locating the property and launching their boat, Normant and his assistants took depth soundings and water quality samples at the site.[2] Next, five grab samples for juvenile shellfish were performed. After this, Normant used a bullrake to take 19 samples of the substrate in the riparian grant for adult clams. He did not sample any further south in the river than the proposed dock would extend, and he surveyed to the north as far as the draft of his boat would permit. The samples were taken from the middle and along the two edges of the riparian grant, in an area covering 938 square feet. The sampling revealed a population of hard clams with a moderate density of 2.6 per square foot.

James Joseph, Chief of the Bureau of Shellfisheries, also testified. His agency oversees the hard clam relay and protects New Jersey shellfish resources. This includes reviewing coastal development. In his career he has conducted extensive estuarine shellfish research and surveys. He testified as an expert on shellfish surveys. In his opinion, the survey conducted by Mr. Normant complied with standard Department procedure, and it was proper for the Department to rely on it in part to deny the petitioner's application. The survey confirmed the presence of a productive shellfish bed with sufficient density and age distribution of clams.

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2. Although he could not remember the distinguishing features at the time of the hearing, Normant testified credibly that he and his assistants used the configuration of the neighbor's dock and features of the petitioner's house to locate the survey site from the water.

Appendix F

Other support for the denial came from histori ıta. According to Mr. Joseph, the Manasquan River w in the area have historically been productive for shellfisl :e shellfish populations were first sampled in 1963. a accumulated by systematic sampling in 1984 estab. ıl that there were high densities of clams in the area o petitioner's property (Exhibit R-2). Mr. Joseph was pre: and one of the principal investigators for the collection that data. When the DEP sampled the location of the proje in April 1993, moderate densities of adult hard clams an high densities of juveniles were found.

Mr. Joseph testified credibly that there is no doubt in his mind that there is a shellfish bed on the petitioner's site. He felt that the report of Mr. Lomax (Exhibit P-11), which states that the central and southern portions of the study site contain hard clam habitat, supports his conclusion that the site has a long history of natural recruitment of shellfish. He noted that populations of hard clams fluctuate over time, and they are not distributed evenly. In addition, clams can live at least 40 years. According to Mr. Joseph, a density of hard clams as little as .05 per square foot would still be an area of natural recruitment. Construction of a dock would require a downgrading of the waters under it, which is prohibited by regulation.

Except for the various opinions of witnesses concerning the actual environmental impact that would arise from construction of a single dock in the petitioner's riparian grant in the Manasquan River, the foregoing is essentially undisputed and is thus **FOUND AS FACT.** In any event, the parties' experts differ only by a shade, as Mr. Scro is of

the opinion that the adverse incremental impact from construction of an individual dock is *real*, while Mr. Lomax feels that there would be no *significant* incremental increase in adverse effect from construction of petitioner's dock.

DISCUSSION AND CONCLUSIONS

N.J.A.C. 7:7E-3.2(a) defines shellfish habitat areas in part to include estuarine bay or river bottoms that have:

> 1. . . . a current shellfish density equal to or greater than 0.20 shellfish per square foot; [or]
>
> 2. . . . a history of natural shellfish production according to data available to the New Jersey Bureau of Shellfisheries, or [are] depicted as having high or moderate commercial value in the Distribution of Shellfish Resources in Relation to the New Jersey Intracoastal Waterway (U.S. Department of the Interior, 1963), "Inventory of New Jersey's Estuarine Shellfish Resources" (Division of Fish, Game and Wildlife, Bureau of Shellfisheries, 1983-present); and/or the "Inventory of Delaware Bays Estuarine Shellfish Resources" (Division of Fish, Game and Wildlife, Bureau of Shellfisheries, (1993).

Using acceptable methodology, the Department's employee, Jeffrey Normant, surveyed the petitioner's riparian grant for shellfish and found a density of hard clams exceeding .20 per square foot. Using acceptable methodology, but alternative equipment, the petitioner's

expert, Joseph Lomax, found a density that was less than .20 per square foot. However, the petitioner's evidence did not discredit or refute the accuracy of the Department's survey, and Mr. Lomax candidly acknowledged that his results did not compel any conclusions about the areas within the riparian grant which he did not survey. Thus, it is more likely than not that the area in question had a shellfish density equal to or exceeding .20 shellfish per square foot on April 30, 1993.

Messrs. Normant and Lomax agreed that there is a hard clam habitat on the petitioner's riparian lot. In addition, there is no genuine dispute concerning the historical presence of commercially significant hard clams in the Manasquan River, dating at least to 1963. A systematic inventory of shellfish in the river in 1984 revealed high densities of hard clams at the location of the petitioner's lot. The unrefuted expert opinion of James Joseph established that the petitioner's lot has a history of natural recruitment of shellfish. Thus, it is clear that the petitioner's riparian lot is within a shellfish habitat area. I so **CONCLUDE.**

Pursuant to *N.J.A.C.* 7:7E-3.2(c), the water located under any boat mooring facility (including docks and associated structures) is automatically condemned and reduced in shellfish growing water classification to "prohibited" status pursuant to *N.J.A.C.* 7:12-2.1(a)1ii. Any development which would result in the destruction or contamination of shellfish habitat, or would result in downgrading of the growing water classification of shellfish habitat, is prohibited. Thus, whether or not construction of

petitioner's proposed dock would destroy or contaminate the shellfish habitat on his riparian lot, it would automatically result in downgrading of the growing water classification from "special restricted" to "prohibited. Therefore, the proposed development is prohibited, pursuant to *N.J.A.C.* 7:7E-3.2(c). I so **CONCLUDE.**

Finally, *N.J.A.C.* 7:7E-3.2(d) prohibits construction of a dock or boat moorings in shellfish habitat, unless either the construction will be a public fishing pier, or the construction will be in waters which have been classified as "prohibited" for the purpose of harvesting shellfish. The shellfish growing water classification for the shellfish habitat on the petitioner's riparian lot is special restricted. Thus, I **CONCLUDE** that the construction of petitioner's proposed dock is prohibited, pursuant to *N.J.A.C.* 7:7E-3.2(d)

As noted above, the petitioner renewed in his post-hearing submissions arguments that had been rejected previously when his motion for summary decision was denied. I do not believe any facts were adduced at the plenary hearing that would warrant departing from the conclusions I reached in denying the motion. However, the arguments are by no means trivial. Thus, I have included the pertinent discussion of them in an appendix to this decision.

Given the credible testimony of the petitioner that he purchased his property on the Manasquan River so that he could build a dock for his boats, it is understandable if he considers the result in this matter harsh, or even arbitrary.

This might be argued because of the lack of actual shellfishing activity on the river, and because of the many docks now present there. However, it is clear that the adverse impact of dock construction in shellfish habitat occurs at least as a legal premise, based upon regulatory assumptions. Is this a procrustean "clam" bed, imposing an arbitrary standard? I do not believe so, to the extent the Department's regulations appear to be based upon scientific data, and to the extent they attempt to strike a reasonable balance between environmental and commercial interests on one hand and recreational interests on the other.

The greatest loss to the petitioner seems to be convenience and full enjoyment of boating. However, he is still able to enjoy both his property and his boats, and he continues to have access to the navigable waters of the Manasquan River, just as when he purchased the property. To the extent that the petitioner, who wants to build a dock in close proximity to his neighbor's existing dock, is situated similarly to other citizens of this State who might also question the fairness of these regulations, it might be well for the Department to revisit the related questions of actual environmental impact and commercial viability of shellfishing under such circumstances.

Based upon the foregoing, I **CONCLUDE** that the petitioner's property is located in a shellfish habitat area and that his application for a Waterfront Development Permit to allow construction of a dock must therefore be **DENIED.** It is so **ORDERED.**

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I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Environmental Protection does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, OFFICE OF LEGAL AFFAIRS, DEPARTMENT OF ENVIRONMENTAL PROTECTION, 401 East State Street, 4th Floor, West Wing, CN 402, Trenton, New Jersey 08625-0402**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 27, 1995 — s/ Joseph F. Fidler
DATE — **JOSEPH F. FIDLER**, ALJ

Appendix F

Receipt Acknowledged:

4-27-95
DATE

s/ [illegible]
DEPARTMENT OF
ENVIRONMENTAL
PROTECTION

Mailed to Parties:

MAY 04 1995
DATE

s/ [illegible]
[stamp]
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE
LAW JUDGE
OFFICE OF ADMINISTRATIVE
LAW

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EXHIBITS

For Petitioner:

P-1	Deed
P-2	Riparian Grant
P-3	Denial of permit application
P-4	Plan
P-5	Alternate Plan
P-6	Photos
P-7	Photos
P-8	Lomax resume
P-9	Shellfish Growing Waters Classification
P-10	Shellfish Survey Guidelines
P-11	Report of Mr. Lomax
P-12	Photo of Sampling Station Transect Stakes
P-13	Permit for Schwartz Pier
P-14	WDA Permit Application
P-15	WDA Permit Approval
P-16	Site Map

For Respondent:

R-1	Letter from Mr. Karam to DEP
R-2	Map of Relative Density of Hard Clams
R-3	*Curriculum Vitae* of Dr. Scro
R-4	Resume of James Joseph

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WITNESSES

For Petitioner:

Edmund Karam
Joseph Lomax

For Respondent:
Robert Scro
Jeffrey Normant
James Joseph

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APPENDIX

There follows here the pertinent portion of the Order Denying Motion for Summary Decision:

The petitioner contends that as a result of the State's conveyance to the Schweinerts in 1924, he has a fee simple interest in lot 5.01, and no title whatsoever remains in the State. *Island Heights v. Presbyterian Camps*, 68 *N.J. Super.* 291, 295 (App. Div. 1961). Since the State conveyed to his predecessor in title not only the riparian land itself, but also the right to construct piers in order to facilitate access to navigable waters, the DEP cannot now deny a permit for such construction as a matter of law. Assuming that a permit to construct a pier would be necessary pursuant to L. 1914, Chapter 123, Section 4, which is now codified as *N.J.S.A.* 12:5-3, the very language of the conveyance from the Board of Commerce and Navigation in effect guaranteed that a permit would be issued.

The petitioner further asserts that if the State can now deny the Karams their right to construct a pier, the State will thereby have denied all reasonable use of the land, since a pier is, for all intents and purposes, the only use to which the riparian land can be put. This would amount to a taking of the land, for which the State must pay just compensation. *Lucas v. South Carolina Coastal Council*, 505 *U.S.* __, 112 *S.Ct.* 2886, 120 *L. Ed.* 2d 798 (1992). As a separate contention, it is also the petitioner's position that in destroying whatever rights the Karams enjoy under the riparian grant, the State has unilaterally reneged upon its contractual obligation, in violation of the contract clause of the United States Constitution, Article I, Section 10.

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Furthermore, the petitioner contends that the Waterfront Development Act of 1914 was never intended to regulate based upon environmental concerns. Reciting the legislative history of this statute, the petitioner asserts that its sole purpose has been to regulate navigation and commerce on navigable waterways. *Lost Chance Development Partnership v. Kean*, 119 *N.J.* 425, 436 (1990); *Long Beach Township Oceanfront Property Owners v. DEP*, 245 *N.J. Super.* 143, 149 (App. Div. 1990). Thus, it its the petitioner's position that the DEP may not, as a matter of law, deny the petitioner a waterfront development permit under *N.J.S.A.* 12:5-3 due to purely environmental concerns, such as impacts upon shellfish. Since the riparian grant from the Board of Navigation and Commerce established the appropriateness of a pier, the DEP's only function should be to review the petitioner's pier plan to ensure that the pier does not unduly interfere with navigation and commerce on the Manasquan River.

In opposition to the motion for summary decision, the DEP contends that the plain terms of the Waterfront and Harbor Facilities Act, *N.J.S.A.* 12:5.1 *et seq.*, as well as the history of its implementation by the Board of Commerce and Navigation, indicate that as the Board's successor, the DEP has ample authority to regulate construction within shellfish beds. Because construction of the proposed dock in the shellfish bed would result in condemnation or contamination of shellfish beds pursuant to *N.J.A.C.* 7:7-2.1(a)(i), *N.J.A.C.* 7:7E-3.2(b) and (c), and *N.J.A.C.* 7:7E-8.3, the permit application was denied. The DEP observes, however, that the petitioner would be free to drop anchor on his own riparian land, and may also utilize public

or private marinas as may be convenient. The DEP also contends that this regulation of construction within shellfish beds does not impair any right secured to the petitioner by the riparian grant.

The DEP contends that shellfish are a commercially significant natural resource found within the navigable tidal waterways of New Jersey, including the Manasquan River. Since the early 1800's, development on such waterways has been regulated. The current statutory regulation is pursuant to the Waterfront and Harbor Facilities Act, and its implementing regulations, *N.J.A.C.* 7:7E-1 *et seq.*, the Rules on Coastal Zone Management. At *N.J.A.C.* 12:5-2, the Act authorizes the DEP to:

> restrain, prevent and remove any construction, erection or accretion injurious to the flow of any such waters, which may be detrimental to the proper navigation thereof and the maintenance and improvement of commerce thereon.

The DEP contends that pursuant to the Act, it is thus enabled to prohibit any development in the navigable waters of this State that has the potential to adversely affect commerce, such as the shellfishing industry. Regulation of development to protect shellfish is "within fair contemplation of the delegation of the enabling statute," *Last Chance Development v. Kean*, 232 *N.J. Super.* 115, 125 (App. Div. 1989), citing *Southern Jersey Airport v. Nat. Bk. Of Secaucus*, 108 *N.J. Super.* 369, 383 (App. Div. 1970), the DEP asserts, and therefore should be upheld.

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It is the DEP's position that the area in which the petitioner proposes to build a dock is properly classified as a "shellfish bed" pursuant to *N.J.A.C.* 7:7E-3.2. Under this regulation, a river bed which is productive for hard clams is a shellfish bed, and if the bed can be shown to have a history of natural recruitment, it is a productive bed. A sampling at the petitioner's site in April 1993 confirmed the presence of moderate (commercially harvestible) densities of hard clams, and high densities of juvenile clams. In addition, shellfish inventory records from 1963 and 1984 confirmed that the area has a history of natural recruitment of hard clams in at least moderate densities. Shellfish can be destroyed or rendered inedible by absorbing pollutants emanating from dock materials, chemicals used to maintain a dock, or from the presence, maintenance or operation of boats kept at a dock. Thus, construction of a dock in a shellfish bed automatically condemns that habitat for purposes of harvesting shellfish. *N.J.A.C.* 7:7-2.1(a)(i).

The DEP traces its policy of protecting shellfish beds from contamination and destruction to 1972. Its rules on Coastal Zone Management are based upon policies enunciated in the Coastal Zone Management Act ("CZMA"), 16 *U.S.C.* § 1451 *et seq.*, wherein Congress noted that:

> the coastal zone, and the fish, shellfish, other living marine resources, and wildlife therein, are ecologically fragile and consequently extremely vulnerable to destruction by man's alterations. [16 *U.S.C.* §1452 (d)].

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Under the CZMA, it became national policy to "preserve, protect, develop, and where possible, restore and enhance" the resources of the nation's coastal zones, including "fish, wildlife and their habitat," 16 *U.S.C.* §1452, and coastal states developed land and water programs implementing "unified policies, criteria, standards, methods and processes for dealing with land and water use decisions." 16 *U.S.C.* §1451 (I). In particular, "special area management plans" were to be formulated to protect commercially valuable and environmentally vulnerable natural resources, such as shellfish. 16 *U.S.C.* §1452. In June 1973, New Jersey enacted the Coastal Area Facility Review Act, which vested with the DEP the authority to regulate certain facilities in the coastal plain and the responsibility to promulgated a management plan.

New Jersey's coastal zone management plan received federal approval in September 1978, and the policy of preventing destruction, contamination or condemnation of shellfish beds has been a part of the coastal management plan since then. The DEP notes that these coastal regulations are presumed valid, *A.A. Mastrangelo, Inc. v. Environmental Protect. Dep't.*, 90 *N.J.* 666, 683 (1982); *New Jersey Guild of Hearing Aid Dispensers v. Long*, 75 *N.J.* 544, 561 (1978), and should be sustained unless "clearly *ultra vires*." *Medical Soc. v. N.J. Dept. of Law*, 229 *N.J. Super.* 128, 134 (App. Div. 1988). It is the DEP's position that these regulations are plainly incident to the regulation of commerce in New Jersey, and that regulation of commerce is properly within the power delegated to DEP under the Waterfront Development Act.

The relationship of this power to the present matter is illustrated by the 1924 riparian grant upon which the petitioner relies. The grant from the Board of Commerce and Navigation documents the State's recognition of the value of commerce in shellfish, reserving to the State the right to lease out the lands in front of the petitioner's pier line "for the cultivation of oysters or of other fish or for any other purpose whatsoever." The DEP argues that there is thus ample precedent for the DEP, as successor to the Board, to incorporate policies protecting shellfish habitat into its regulations governing the issuance of waterfront development permits.

The DEP further contends that there is no reason to invalidate a regulation under the Waterfront Development Act merely because it may be characterized as "environmental" in effect. "Environmental concerns are inextricably linked with the regulation of commerce." *Last Chance*, 119 *N.J.* 425, 435. The legislative objective of the Act is not simply fostering and promotion of marine commerce. *Distributec, Inc. v. New Jersey Dept. of Environmental Protection and Energy, et al.*, 274 *N.J. Super.* 1, 10 (App. Div. 1994). The Act's true legislative objective is "to regulate commercial development of the waterfront to facilitate navigation and commerce." *Matter of Waterfront Development Permit No. 87-1235-1*, 257 *N.J. Super.* 524, 530-31 (App. Div. 1992). Thus, the *Distributec* court found regulations setting forth criteria for the siting of new ports, prohibiting ports in areas incompatible with surrounding land uses, *N.J.A.C.* 7:7E-7.9(d), and requiring applicants to show unavailability of land adjacent to existing ports, *N.J.A.C.* 7:7E-7.9(c), to be a valid exercise of

authority pursuant to the Act. Even though the regulations had the beneficial environmental effect of discouraging "the dispersion of the many problems of port operations to other non-port areas," *Distributec*, at 10, the court found the regulations to be "precisely the type of administrative control over commercial development and marine commerce which the Legislature envisioned when it enacted the WDA." *Id.* at 10.

In opposing the petitioner's motion for summary decision, the DEP also disputes the petitioner's assertion that the riparian grant to his predecessor in title requires that he now be entitled to construct a pier, as a matter of law. According to the DEP, to construe a grant such as the petitioner's as a *de facto* permit of unlimited duration, allowing any activity recited therein, is unsupported in law and is poor public policy. The DEP analogizes this matter to regulation of land above the mean high water line, noting that it has long been recognized that

> land conveyed is held by the grantees on the same terms on which all other lands are held by private persons under absolute titles, and every previous right of the State of New Jersey therein, whether proprietary or sovereign, is transferred or extinguished, *except such sovereign rights as the State may lawfully exercise over all other private property.* [*Brennenstuhl v. Land Use Regulation, NJDEP*, 93 *N.J.A.R.* 2d (EPE) 125, 128 (1993), citing *Mayor and Council of Hoboken v. Pa. R.R. Co.*, 124 *U.S.* 656, 8 *S.Ct.* 643, 31 *L.Ed.* 543, 552 (1988), emphasis added.

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The DEP suggests a clear example of a sovereign right the State may lawfully exercise over private property is the prohibition of certain land uses in certain land areas by zoning. An existing land use is not immunized from subsequent change in zoning or other laws which can restrict or prohibit that use completely. See, *Dimitrov v. Carlson*, 138 *N.J. Super.* 52, 59 (App. Div. 1975). Thus, the DEP asserts that land uses previously deemed benign or beneficial may be restricted or prohibited entirely by authorities with jurisdiction over those uses in response to evolving societal expectations or environmental constraints. As successor to the Board of Commerce and Navigation, the DEP is authorized to regulate the uses of riparian land and to direct development away from areas containing important natural resources such as shellfish. Nothing in the 1924 grant expressly precludes the DEP from regulating riparian land just as a municipality regulates property within its jurisdiction. The DEP contends that since present and future law forms are an implied provision of every contract, there is no basis to argue that it lacks the authority to regulate petitioner's riparian lands to protect shellfish and the commerce which depends on it.

The DEP also argues that the petitioner's claim of contract impairment should be rejected. The prohibition against pier construction does not impair the fundamental purpose of the riparian grant, which is to ensure access to navigable waters. While a pier would make access to the Manasquan River more convenient, access is nevertheless available without it. The DEP also argues that the petitioner's constitutional claim should fail because the conditions on coastal development of which the petitioner

complains have been an implied provision of the grant since December 1978, well before he purchased the riparian land in question. Furthermore, any inconvenience which the petitioner may experience in accessing his boat to travel on the Manasquan River is far outweighed by the public interest in preserving shellfish as a commercial commodity and natural resource. Thus, the DEP argues that if there is any contractual impairment, it is incidental and necessary to serve important public purposes.

In reply to the DEP's opposition, and in further support of his motion for summary decision, the petitioner notes that the DEP has conceded that the petitioner has the right to moor his boat within his riparian grant area. Petitioner contends that under the DEP's own rules, such mooring automatically condemns the area for shellfishing. Pursuant to *N.J.A.C.* 7:12-2.1(a)(1)(ii), "all marinas, anchorages or other places where docking or mooring facilities are provided for boats" are classified as prohibited for the taking of shellfish. Because the petitioner's riparian grant would thus already be condemned for shellfish, the petitioner asserts, then the DEP improperly denied him a waterfront development permit to construct a pier. If the area is already deemed condemned for shellfish purposes, then the construction of a pier could have no effect on that designation.

The petitioner also reemphasized his argument that the 1924 riparian grant gives him an absolute right to construct a pier on his property. According to the petitioner, there is no ambiguity in the grant, and strict construction compels the conclusion that petitioner's predecessor in title paid for

and received the absolute right to fill and construct a pier. The grant provides that a pier is the only use to which the riparian grant can be put, and the DEP must now honor its terms. Denying petitioner all reasonable beneficial use of the riparian grant is the most severe impairment of petitioner's rights imaginable. It is the petitioner's position that such action by the DEP is unconstitutional, as it amounts to "total destruction" of the State's contract obligation to the petitioner. *U.S. Trust Co. v. New Jersey*, 431 *U.S.* 1, 26, 97 *S.Ct.* 1505, 52 *L.Ed.* 2d 92 (1977). In addition, petitioner asserts that the DEP has not demonstrated that it can now regulate the use of land it once owned, where the same agency which conveyed the riparian grant has authority to approve construction pursuant to *N.J.S.A.* 12:5-3.

Finally, petitioner contends that the DEP has failed to demonstrate that *N.J.S.A.* 12:5-3 was ever intended by the Legislature to protect shellfish, or that the Board of Commerce and Navigation ever so construed it. According to the petitioner, *N.J.S.A.* 12:5-3 was designed to address "the lay-out of piers and other structures with relation to each other, or to the general commerce of the district and port." *Distributec, Inc. v. NJDEPE*, *supra*, at 6, citing *Last Chance Development*, *supra*, at 119, 120. Petitioner contends that it is noteworthy that Title 50 of New Jersey Statutes Annotated is devoted to regulation of every aspect of shellfishing, including oyster, clams, and mussels. Yet, nowhere within this comprehensive scheme did the Legislature ever mandate that no piers could be constructed within any area where shellfish are present.

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It was not until 1978, 64 years after enactment of the Waterfront Development Act, that DEP began to consider shellfish impacts when processing applications for docks or piers. Petitioner contends that the injection of purely environmental factors, such as shellfish, into the DEP's decision-making process regarding commerce and navigation on navigable waters is without legislative authorization. According to the petitioner, this is nothing more than an attempt by DEP to apply the Waterfront Development Act to give it new authority, notwithstanding "more than a half century of a contrary understanding of the purpose and effect of the act." *Last Chance*, *supra*, 119 *N.J.* at 434. Petitioner further argues that the Legislature was concerned with "commerce thereon," *N.J.S.A.* 12:5-2, that is, commerce on the navigable waters, and that this clear reference to boat traffic can not be construed to include the harvesting of shellfish from the bottom of such waters.

In its final response to the petitioner's arguments, the DEP contends that Title 50 does not preclude the State from regulating commerce in shellfish and protecting it from the detrimental effects of development under the Waterfront and Harbor Facilities Act, *N.J.S.A.* 12:5-1. At *N.J.S.A.* 12:5-2, the Act authorizes DEP, in pertinent part, to

> restrain, prevent and remove any construction, erection or accretion injurious to the flow of any such waters, which may be detrimental to the proper navigation thereof and the maintenance and improvement of commerce thereon. (Emphasis added).

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As the DEP explained in its initial brief, shellfish were plainly understood to constitute "commerce" under the Act long before petitioner's riparian grant was issued in 1924, and accordingly, development on petitioner's riparian lands must meet the requirements of the Act and its implementing regulations, *N.J.A.C.* 7:7E-1 *et seq.*, the Rules on Coastal Zone Management. In contrast, Title 50's predecessor, *N.J.S.A.* 24:1-1 *et seq.*, was devoted to ensuring wholesomeness in food, particularly shellfish. Title 50 has amplified this concern by preserving State control over the condemnation and leasing of shellfish beds, and the timing and methods by which shellfish can be harvested in New Jersey. According to the DEP, such legislation is parallel to and not preclusive of other laws such as Title 12 which regulate development in the waters of the State, whether or not they contain shellfish. Even if Title 50 were the exclusive source of power for DEP to preserve commerce in shellfish, DEP asserts that the protection of shellfish beds from physical invasion and destruction could be accomplished under the rubric of another permitting program such as waterfront development as long as no other permitting program regulated that aspect of shellfish management. See, *Society for E.E.D. v. NJDEP*, 208 *N.J. Super.* 1,8 (App. Div. 1985). (Allowing DEP to implement in a single set of rules overlapping areas from a variety of statutory programs). In this matter, DEP asserts, there is no statute other than *N.J.S.A.* 12:5-1 *et seq.*, and the regulations promulgated pursuant to the Act which regulates development in shellfish waters.

The DEP asserts that there is no basis for petitioner's conclusion that the State's failure to articulate policies

protecting shellfish in the early decades of this century limits the State's explicit power under the Act to protect commerce in shellfish now. As indicated by the affidavit of George Filmlin, Jr., of the Rutgers Cooperative Extension of Ocean County, shellfish did not require protection until the last few decades, when shellfish landings began to decline precipitously. Only when the decreased landings clearly evidenced a long-term trend did the State have cause to restrict development to protect this commerce which was entrusted to it under the Act. Because 90% of all commercial clammers in 1993 relied for their harvest upon naturally occurring shellfish found in State approved waters using traditional methods, the DEP argues that it is plain that continued protection under the Act of existing sources of shellfish is critical to the livelihoods of the vast majority of licensees. It is the DEP's contention that no principle of law supports the petitioner's inference that the State waived its legislatively granted jurisdiction to protect this commerce merely because regulatory intervention did not occur until recently, when the problem reached critical proportions.

Finally, the DEP contends that there is no basis for the petitioner to argue that the right to drop anchor in waterways within the State of New Jersey carries with it the right to place permanent structures in shellfish beds. The DEP concedes there is no regulatory mechanism for the State to monitor where a person may casually moor his boat from day to day so as to allow the State to formally condemn that portion of water. Similarly, the State cannot follow each boat as it passes over shellfish beds to determine whether pollutants are being discharged. According to the DEP, while both activities may result in discharge of pollutants,

monitoring and regulating these activities is too costly, and would be socially unacceptable to most citizens. However, this type of forbearance does not waive the State's jurisdiction to regulate those activities plainly within its statutory authority which are easily regulated, and which are a source of pollution affecting the viability and harvestibility of an important natural resource.

The DEP concedes that construction of the petitioner's project may condemn only a small portion of the shellfish beds in the State. However, it is the DEP's contention that such activity, undertaken by others similarly situated throughout the State would, eventually, completely undermine the remaining shellfish commerce in New Jersey. Consequently, the DEP argues that the resource can only be preserved if waterfront development is regulated in all instances, including petitioner's. An unknown portion of waterways currently productive for shellfish would be opened to unregulated development if certain areas of water were exempted from regulation merely because ownership had previously been deeded away from the State. It is the DEP's position that such development, inevitably spreading state-wide, would threaten the only habitat available to support an important commercial resource and would undeniably jeopardize the livelihood of hundreds of persons in the New Jersey shellfish industry.

Resolution of the petitioner's motion for summary decision depends upon the answers to two broad questions. The first is whether the DEP has the authority, under regulations promulgated subsequent to the riparian grant, to affect the grantee's utilization of the grant. The second

question is whether the DEP may protect shellfish with regulations promulgated under authority of the Waterfront Development Act. As I am in agreement with the essence of the DEP's arguments in this matter, I believe both questions should be answered affirmatively.

I agree that construing a riparian grant such as the petitioner's as a *de facto* permit of unlimited duration, allowing any activity recited in the grant, is unsupported in law and is poor public policy. The DEP analogy to regulation of land above the mean high water line is apt:

> land conveyed is held by the grantees on the same terms on which all other lands are held by private persons under absolute titles, and every previous right of the State of New Jersey therein, whether proprietary or sovereign, is transferred or extinguished, *except such sovereign rights as the State may lawfully exercise over all other private property*. [*Brennenstuhl v. Land Use Regulation, NJDEP*, 93 *N.J.A.R.* 2d (EPE) 125, 128 (1993), citing *Mayor and Council of Hoboken v. Pa. R.R. Co.*, 124 *U.S.* 656, 8 *S.Ct.* 643, 31 *L.Ed.* 543, 552 (1988), emphasis added.

As noted by the DEP, a clear example of a sovereign right the State may lawfully exercise over private property is the prohibition of certain land uses in certain land areas by zoning. An existing land use is not immunized from subsequent change in zoning or other laws which can restrict or prohibit that use completely. See, *Dimitrov v. Carlson*, 138 *N.J. Super.* 52, 59 (App. Div. 1975). Thus, evolving

societal expectations or environmental constraints may result in land uses previously deemed benign or beneficial being restricted or prohibited entirely by authorities with jurisdiction over those uses. Nothing in the 1924 grant expressly precludes the DEP from regulating riparian land just as a municipality regulates property within its jurisdiction. Since present and future law forms are an implied provision of every contract, the grant itself does not provide a basis to argue that DEP lacks the authority to regulate petitioner's riparian lands to protect shellfish and the commerce which depends on it. I so **CONCLUDE.**

It is appropriate to note here that I agree that the prohibition against pier construction does not impair the fundamental purpose of the riparian grant, which is to ensure access-to navigable waters. A pier would make access to the Manasquan River more convenient, but access is nevertheless available without it. In addition, the conditions on coastal development of which the petitioner complains have been an implied provision of the grant since December 1978, well before he purchased the riparian land in question.

The DEP's submissions show that shellfish are a commercially significant natural resource found within the navigable tidal waterways of New Jersey, including the Manasquan River. At *N.J.A.C.* 12:5-2, the Act authorizes the DEP to:

> restrain, prevent and remove any construction, erection or accretion injurious to the flow of any such waters, which may be detrimental to the proper navigation thereof and the maintenance and improvement of commerce thereon.

Appendix F

Is regulation of development to protect shellfish "within fair contemplation of the delegation of the enabling statute," *Last Chance Development v. Kean*, 232 *N.J. Super.* 115, 125 (App. Div. 1989), citing *Southern Jersey Airport v. Nat. Bk. Of Secaucus*, 108 *N.J. Super.* 369, 383 (App. Div. 1970), as the DEP asserts? Pursuant to the Act, the DEP is enabled to prohibit any development in the navigable waters of this State that has the potential to adversely affect commerce. In my view, this includes the shellfishing industry. I so **CONCLUDE.**

Based upon the foregoing, I **CONCLUDE** that the petitioner has not demonstrated that he is entitled to decision as a matter of law. *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N.J.* 67 (1954); *N.J.A.C.* 1:1-12.5. Therefore, I further **CONCLUDE** that the motion of the petitioner for summary decision should be **DENIED**.

APPENDIX G — DENIAL OF WATERFRONT DEVELOPMENT APPLICATION OF EDWARD KARAM DATED MAY 11, 1993

State of New Jersey
Department of Environmental Protection and Energy
Environment Regulation
Land Use Regulation Program
CN 401
Trenton, NJ 08625-0401
Tel# 609-984-3444
Fax# 609-292-8115

Scott A. Weiner
Commissioner

MAY 11 1993

CERTIFIED MAIL
663 521 762

Mr. Walter Scharfenberg
George W. Henn, Inc.
435 Mantoloking Road
Bricktown, NJ 08723

RE: Waterfront Development Application
File No. 1308-93-0005.1
Edward Karam
Block 99.03, Lot 5 & 5.01
Borough of Brielle, Monmouth County
Manasquan River Watershed; Atlantic Coastal Basin

Appendix G

Dear Mr. Scharfenberg:

The Land Use Regulation Program acting under the provisions of N.J.A.C. 7:7H-1.1 *et seq.*, has decided not to grant permit application 1308-93-0005.1 for the reasons set forth as follows:

SITE AND PROJECT DESCRIPTION

The project site is located on the Manasquan River and is known as block 99.03, lots 5 & 5.01 in the Borough of Brielle, Monmouth County.

The proposed project includes the construction of a 6' x 170' fixed dock with a 8' x 18' "L"-shaped extension and the driving of three mooring piles. This is as shown on plans in one sheet entitled, "Proposed Dock and Mooring Piles", dated February 3, 1993 and revised March 21, 1993 as prepared by Walter Scharfenberg.

ADMINISTRATIVE HISTORY

The following is an administrative history relating to this application:

February 10, 1993 — Application was received by the Land Use Regulation Program, Bureau of Coastal Regulation.

Appendix G

April 6, 1993 — Water Technical Program's, Bureau of Marine Water Classification and Analysis recommends denial based on the presence of shellfish beds, condemnation of shellfish habitat and degradation of water quality.

May 3, 1993 — Division of Fish, Game and Wildlife Bureau of Shellfisheries, recommends denial based on the presence of shellfish beds and condemnation of viable shellfish habitat.

The deadline for decision on this application is June 15, 1993.

ANALYSIS

The following analysis is based on New Jersey's Rules on Coastal Zone Management (N.J.A.C. 7:7E-1.1 *et seq.*).

7:7E-3.2 Shellfish Beds

Shellfish Beds are identified as "Special Water Areas" which merit focused attention and special management policy.

Appendix G

(a) "Shellfish beds" are estuarine bay or river bottoms that are productive for hard clams (*Marcenaria mercenaria*), soft clams *Hya arenaria*), eastern oysters (*Crassostrea virginica*), bay scallops (*Argopecten irradians*), or blue mussels (*Mytilus edulis*). A productive bed is one which can be shown to have a history of natural recruitment for one or more of these species, or is leased by the State of New Jersey for shellfish culture, or is a State Shellfish Management Area.

(b) Any development which would result in the destruction of shellfish beds is prohibited.

(c) Any coastal development which would result in the contamination or condemnation of shellfish beds is prohibited. Development which significantly alter the water quality, salinity regime, substrate characteristics (as through runoff or sedimentation), natural water circulation pattern, or natural functioning of shellfish beds during construction or operation of the development is prohibited.

In 1983, the Bureau of Shellfisheries, Division of Fish, Game and Wildlife, conducted a shellfish inventory of the Manasquan River, moderate to high densities of hard clams are present within the vicinity of the project site. A site inspection performed by that Bureau on April 30, 1993 confirmed moderate to high densities within the project site.

Appendix G

The Shellfish Growing Water Classification Charts (1990-91), classify the Navesink River as Special Restricted. This area has been used in conjunction with existing State sanctioned resource recovery programs including relay and depuration.

In accordance with N.J.A.C. 7:12-1.2, "Special Restricted Areas" mean certain condemned areas meeting specified sanitary standards as set forth by the ISSC. Application for the removal of the shellfish to be used for human consumption from these areas will be considered for transplant, transfer, relaying, depuration, and controlled depuration. "Relaying" means the taking of shellfish from areas other than approved areas for replanting in approved areas for purposes of purification prior to marketing.

New Jersey Administrative Code 7:12-2.1 (a) ii, states that shellfish growing waters are classified as "Prohibited where docking or mooring facilities are provided for boats". The proposed facility would result in the downgrading of water quality at the site to prohibited status, prohibiting the taking of shellfish for human food purposes.

In conclusion, the project fails to meet the policy on Shellfish Beds. The Shellfisheries Policy (7:7E-8.3) contains similar restrictions and complements this Rule by prohibiting mooring construction in estaurine bay and river bottom which are potentially productive for hard and soft clams. Therefore, the proposed activity also fails to meet the Shellfisheries Rule and is prohibited.

Appendix G

SUMMARY

The proposed project is prohibited for the reasons discussed above and is hereby denied.

Any interested person who considers himself or herself aggrieved by this permit decision may request a hearing on this decision by submitting a written request for a hearing to the following address: Office of Legal Affairs, Department of Environmental Protection and Energy, CN 402, Trenton, NJ 08625-0402, Attention Adjudicatory Hearing Requests.

This written request must include a copy of the attached Administrative Hearing Request Checklist and all information identified in Section III of that list.

Pursuant to the Coastal Permit Program Rules, specifically N.J.A.C. 7:7-5.1, written appeals must be received by the Department at the above address within 10 days of publication of notice of the final decision in the DEPE Bulletin, or within 10 days of publication of notice by the permittee pursuant to N.J.A.C. 7:7-4.8(b), whichever occurs first.

In order to promote intergovernmental cooperation in management of our natural resources, a copy of this decision shall be shared with appropriate local and federal agencies.

If you have any questions on this decision, please contact the Program in writing at the above address or by telephone at (609)984-0184.

Appendix G

Sincerely,
s/ Ruth Ehinger
Ruth Ehinger, Manager
Bureau of Coastal Regulation

c. US Army Corps of Engineers, Philadelphia District
Bureau of Coastal and Land Use Enforcement, Toms River
Application File
Borough of Brielle Clerk
Borough of Brielle Planning Board
Borough of Brielle Construction Official
Monmouth County Planning Board
Sandra Groppenbaucher, Bureau of Marine Water Classification and Analysis
James Joseph, Bureau of Shellfisheries

APPENDIX H — PERTINENT STATE REGULATIONS

New Jersey Administrative Code

N.J.A.C. 7:7E-3.2(a)

(a) Shellfish habitat is defined as an estuarine bay or river bottom which has a history of production for hard clams (Mercenaria mercenari), soft clams (Mya arenaria), eastern oysters (Crassostrea virginicia), bay scallops (Argopecten irradians), or blue mussels (Mytilus edulis), or otherwise listed below in this section. A shellfish habitat area is defined as an area which meets one or more of the following criteria:

1. The area has a current shellfish density equal to or greater than 0.20 shellfish per square foot;

2. The area has a history of natural shellfish production according to data available to the New Jersey Bureau of Shellfisheries . . . .

N.J.A.C. 7:7E-3.2(c)

(c) The water located under any boat mooring facility (including docks and associated structures) is automatically condemned and reduced to "prohibited" status pursuant to N.J.A.C. 7:12-2.1(a)1ii. Development which would result in the destruction, condemnation (downgrading of the shellfish growing water classification) or contamination of shellfish habitat is prohibited.

* * *

Appendix H

N.J.A.C. 7:7E-3.2(d)

(d) Construction of a dock or boat moorings in shellfish habitat is prohibited, except for the following:

1. Public fishing piers owned and controlled by a public agency for the sole purpose of providing access for fishing; and

2. In waters which have been classified as "prohibited" for the purpose of harvesting shellfish.

No. 98-1866

Supreme Court, U.S.
F I L E D
JUN 21 1999
CLERK

In the

Supreme Court of the United States

PETER DIBIAGIO and LAURA DIBIAGIO, EDMUND T. KARAM and BARBARA KARAM,
Petitioners,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ROBERT SHINN, Commissioner of the Department of Environmental Protection,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

---

Brief of the Respondents In Opposition to Petition

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Counsel of Record and On the Brief

1688

QUESTIONS PRESENTED

Where petitioners acquired in one deed an improved property containing uplands, a single family home, and riparian land, and subsequently brought an inverse condemnation action after the State denied their application to construct a dock within shellfish habitat, based on pre-existing restrictions:

1. Did the New Jersey Supreme Court properly reject the owners' claim of a compensable taking under the Fifth Amendment because the riparian land was part of a larger, improved property which retained significant value and use?

2. Is a landowner who acquires in one deed improved property that includes uplands and riparian land entitled to compensation for the denial of an application to build a pier on his riparian land within shellfish habitat?

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STATEMENT OF THE CASE

This petition seeks review of the New Jersey Supreme Court's decision that the State did not take the property of petitioners Barbara and Edmund Karam without just compensation when it denied their application to build a dock within shellfish habitat in the Manasquan River. The Karams acquired their riparian land as part of a larger property that also contained uplands and a single family home, at a time when development restrictions based on shellfish habitat already were in effect. While the litigation below was pending, the Karams sold the improved uplands and riparian land to petitioners Peter and Laura DiBiagio for $1.1 million. At all times, the Karams' upland and riparian lots were taxed as a single unit (Pa17). Petitioners' riparian land is public trust property subject to New Jersey's longstanding public trust doctrine.

Despite these facts, petitioners argued that their riparian land constituted a separate and distinct "property" and that a State tidelands grant issued in 1924 to their predecessors in title permitted the unconditional construction of a dock on the riparian, public trust land. The New Jersey Supreme Court rejected these assertions and petitioners' claim of a regulatory taking of the riparian land.

A. STATEMENT OF FACTS

In 1924, the State of New Jersey conveyed 523,681 square feet of tide-flowed land below the mean high water line of the Manasquan River to the owners of the adjacent uplands, Charles and May Schweinert, for $5,301.00 (Pa32).
The State tidelands grant required the Schweinerts to also own the land above mean high water or the riparian land would be forfeited (Pa4 - Pa5).

The grant specified that the riparian land below the bulkhead line could not be used for anything but a pier (Pa33), but when the grant was issued, the State's Waterfront Development Act of 1914 required a permit for the

construction of a pier, dock, or other waterfront development (Pa5). In addition, the tidelands conveyed to the Schweinerts were public trust land over which the State could not waive its regulatory authority (Pa18).

The Schweinerts subdivided their land, but always sold both upland and riparian land to each purchaser. Many of these subsequent owners erected docks, but not on the riparian land ultimately acquired by the Karams (Pa6). In 1987, over 60 years after the tidelands grant was issued to the Schweinerts, the Manasquan River was classified as a "special restricted area" that contained high densities of shellfish suitable for human consumption (Pa6). As a result, the construction of a dock or pier became prohibited, because docks and boats can release toxins which make shellfish unsafe (Pa37; Pa51).

In 1993, petitioners Barbara and Edmund Karam purchased in a single deed an upland lot on the Manasquan River which contained a single family home and an adjacent riparian lot of 30,680 square feet. The riparian lot constituted a small portion of the riparian land conveyed to the Schweinerts 69 years earlier (Pa32). The Karams then applied for a waterfront development permit for a dock, which was denied because of the presence of shellfish habitat. The denial was without prejudice to the right to reapply for a permit in the event of a change in regulations (Pa28).

B. PROCEEDINGS BELOW

The Karams brought an inverse condemnation lawsuit in the State courts, alleging that the denial of their application to construct a dock had effected a taking of their property without compensation under *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992). The trial court ruled that the permit denial had deprived the Karams of all viable use of the State's riparian grant of 1924 (Pa6), but the State Appellate Division reversed. The Appellate Division found

that the "property as a whole" included both the upland and the riparian land, and that the tidelands grant of 1924 did not contain an absolute and perpetual right to construct a dock, free from all legislative and regulatory intervention (Pa18 - Pa20).

The Appellate Division decided that the upland and riparian lands were a single property because in "both law and fact, the properties are inextricably intertwined." (Pa17). The Appellate Division also determined that the Schweinerts never had an absolute right to construct a dock under their 1924 tidelands grant, since construction always was conditioned on the requirement to obtain a permit and the State could not waive its right to regulate tidelands, which are public trust property (Pa20; Pa19). The State Supreme Court affirmed the Appellate Division's decision and denied petitioners' motion for reconsideration.

SUMMARY OF ARGUMENT

This Petition does not present any issue requiring resolution by this Court. This Court previously has held that a regulatory takings analysis must focus on the "parcel as a whole," not on discrete segments of the parcel. The courts below studiously adhered to this principle, and determined based on the totality of the facts and a correct analysis of the State tidelands grant of 1924 that the petitioners owned a single "parcel." This factual determination was completely consistent with many federal and state court decisions resolving disputes over what land constitutes the "parcel as a whole."

Both the federal and state courts have examined a variety of factors to resolve disputes over the "parcel as a whole," including unity of ownership, unity of use, unity of

investment, unity of development plan, and regulatory history. All of these factors weighed in favor of viewing petitioners' contiguous upland and riparian land as a single property, and were considered by the courts below.

The State courts did not rely on any single factor or legal standard to resolve the dispute over what land constituted the "parcel as a whole" or "denominator," but determined that under any of the commonly-used standards, the petitioners owned one property. Thus, this case does not present any issue requiring resolution and would be a singularly inappropriate vehicle to address what factors should be used in a "parcel as a whole" analysis. In fact, an attempt to resolve this issue through this case would come perilously close to issuing an advisory opinion and to reviewing a finding of fact.

In addition, the decision below turned on the State courts' interpretation of a State tidelands grant, State tidelands and property law, and the State's public trust doctrine. This interpretation was necessary because property rights are not derived from the Constitution, but from an independent source such as State law. Since the State courts addressed these underlying issues of State law, this Court should not revisit them under the guise of resolving an issue that has not been presented in this case. Accordingly, the Petition for a Writ of Certiorari should be denied.

REASONS FOR DENYING THE WRIT

In 1993, petitioners Barbara and Edmund Karam acquired in a single deed an improved property containing uplands and riparian land which was always taxed as a single property. At the time, the Manasquan River on which the property was located already was classified as a "special restricted area" based on the presence of shellfish habitat, and numerous State

environmental laws restricting the development of riparian land were in place. In 1995, the State denied petitioners' application to build a dock in the riparian land, based on these pre-existing restrictions. The Karams then filed an inverse condemnation action in State court, and sold their improved uplands and riparian land to petitioners Peter and Laura DiBiagio for $1.1 million.

I. THIS CASE PRESENTS NO ISSUE IN NEED OF RESOLUTION BECAUSE THE PETITIONERS OWNED A SINGLE PROPERTY PURSUANT TO ALL OF THE TESTS COMMONLY USED TO RESOLVE A DISPUTE OVER THE "DENOMINATOR" ISSUE.

This case is a fact-sensitive matter in which the State courts properly determined that a landowner who purchased an improved property containing both uplands and riparian land was not entitled to compensation when the State denied an application to build a pier on the riparian land within shellfish habitat. To reach this decision, the State courts correctly rejected the petitioners' claims that their riparian land was a separate "property" and that the 1924 tidelands grant constituted a perpetual permit to build a dock on the land.

When petitioners Barbara and Edmund Karam purchased their property, and at all times thereafter, it contained a single family home on its uplands portion. In addition, the upland and riparian portions of the property always were taxed as a single unit. The petitioners were not allowed to build a pier on the riparian land because it contained significant numbers of clams, which can become unfit for human consumption if they are exposed to toxins from docks and boats (Pa51; Pa37).

These restrictions were in place when petitioners acquired the property in 1993.

Since the early nineteenth century, New Jersey law has recognized that the public has a common right to take shellfish from tidelands, under the State's longstanding public trust doctrine. See *Arnold v. Mundy*, 6 N.J.L. 1 (1821)(recognizing the right of an alleged "trespasser" to take oysters from riparian land allegedly in private ownership). Moreover, the Manasquan River on which the property is located has contained significant shellfish habitat for many years (Pa39). Based on this fact, a deterioration in the River's water quality prompted federal, State and local officials to institute a program to improve the River's water quality and protect its shellfish. 26 N.J.R. 988 (1994). The Karams bought their property in 1993, but State environmental laws protecting natural resources such as shellfish habitat were enacted in the 1970's, well before that time (Pa19 - Pa20).

The owners' claim for compensation rested on the premise that the riparian land constituted a separate "property" and that the State tidelands grant issued in 1924 to their predecessors in interest contained an unlimited right to build a pier on their riparian land. However, the tidelands grant of 1924 encompassed over 523,000 square feet, much more than the Karams' property, and until the Manasquan River was classified as a "special restricted area," piers were built within the granted area. In addition, the 1924 grant required common ownership of the upland and riparian land or the riparian land would be forfeited, and the grant was subject to the State's 1914 Waterfront Development Law and to its longstanding public trust doctrine.

Both the facts and the law clearly demonstrated that the Karams owned a single property. The 1924 tidelands grant was conveyed to the Schweinerts as the upland owners, and after obtaining the grant, the Schweinerts always conveyed upland and riparian land together. The Karams purchased the

riparian land and improved uplands in a single deed, and the lands always were taxed as a single unit. As the Appellate Division concluded, the right to build a dock was "a mere incident to use of the upland property" and in "both law and fact, the [upland and riparian] properties are inextricably intertwined." (Pa17).

These facts make this a singularly inappropriate vehicle for examining the "property as a whole" or "denominator" issue. This Court has squarely held that a takings analysis must examine the impact of governmental restrictions on the "parcel as a whole," not on discrete segments. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 130-31 (1978); *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993). The courts below studiously followed this holding.

In addition, although federal and state courts sometimes have emphasized different factors to decide what land comprises the "parcel as a whole," these courts have repeatedly viewed contiguous land that is commonly owned as a single "parcel." In addition, both federal and state courts have often found that a single "parcel" exists if the land is contiguous and commonly owned; the uses of each part of the land are interrelated; there is a unified investment; and the contiguous lands under common ownership benefit each other. See John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 Univ. Chi. Law Rev. 1535, 1550-1554 (1994).

All of these factors were present here and formed the basis for the factual determination that the riparian land and improved upland formed a single "property." Thus, the courts below did not focus on a single factor or test to resolve the "denominator" dispute, but decided that under any of the standard criteria, petitioners owned a single property. Given these circumstances, it would be entirely inappropriate to use

this case as a vehicle for establishing a uniform "denominator" test or criteria.

Moreover, in cases involving commonly-owned, contiguous upland and riparian land, courts typically have concluded that the uplands and riparian lands form a single "property." See, e.g., *Forest Properties, Inc. v. United States*, _ F. 3d _ , 1999 Westlaw 311246 (Fed. Cir. 1999); *Palm Beach Isles Associates v. United States*, 42 Fed. Cl. 340 (1998), app. pending. Similarly, in cases involving commonly-owned, contiguous upland and wetlands, courts typically have concluded that the uplands and wetlands form a single "property." See, e.g., *Tabb Lakes Ltd. v. United States*, 10 F. 3d 796 (Fed. Cir. 1993); *Zealy v. City of Waukesha*, 548 N.W. 2d 528 (Wisc. 1996). This approach recognizes that an owner of contiguous uplands and riparian land ordinarily will use the upland to facilitate use of the riparian land for fishing, swimming, or other water-oriented activity. In addition, it prevents an owner of contiguous uplands and riparian land from obtaining a public payment of "just compensation," simply because the government has made a legitimate regulatory distinction between environmentally sensitive land and land that is not environmentally sensitive.

None of the cases cited in the Petition treat commonly-owned, commonly-acquired, contiguous uplands and riparian land as separate properties for the purposes of takings analysis. Thus, petitioners are manufacturing a non-existent conflict to address a non-existent issue. Moreover, the courts below used a multi-factor analysis to resolve the "denominator" dispute, which was fully consistent with the approach used throughout the federal and state courts.

Under a minority approach in takings jurisprudence, property that is sold before the advent of governmental regulation sometimes is considered as a separate parcel from the remaining land that subsequently becomes subject to

regulation. See, e.g., *Loveladies Harbor, Inc. v. United States*, 28 F. 3d 1171 (Fed. Cir. 1994). However, this case did not involve those facts either.

The Karams purchased their uplands and riparian land in one transaction in 1993, after regulations prohibiting the construction of a dock within shellfish habitat already were in place. State environmental laws affecting petitioners' riparian land had been enacted in the 1970's, and under the State's Waterfront Development Law of 1914, a permit always was required to erect a dock. Moreover, the State's public trust doctrine always applied to the riparian land and prevented the State from waiving its regulatory control over it. The State courts used these facts to reject petitioners' claim that the riparian land was a separate property.

Petitioners' lands formed a single "property" under each of the common tests and standard criteria used to resolve the "denominator" issue. Accordingly, it would serve no purpose for this Court to review this case anew, in order to decide what criteria to use. Simply put, this matter does not present the "denominator" issue as an issue requiring resolution. Instead, any attempt to resolve the "denominator" issue within the context of this case would come dangerously close to the rendering of an advisory opinion and to the resolution of a factual dispute.

II. THIS MATTER ALSO WAS RESOLVED ON THE BASIS OF STATE LAW PRINCIPLES WHICH DO NOT WARRANT REVIEW BY THIS COURT.

As this Court previously has determined, takings analysis examines the effect of governmental action on the "parcel as a whole" and does not segment the property into discrete segments. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 130-31 (1978); *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993). Similarly, to determine whether a taking of real property has occurred, a court must examine a property owner's entire bundle of rights in the property. *Andrus v. Allard*, 444 U.S. 51 (1979).

Moreover, "property" is not defined by the Fifth Amendment or the Constitution, but is a function of pre-existing background principles of State law. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Thus, to determine whether "property" has been taken and the existent bundle of property rights in a piece of real property, the applicable background principles of State property law must be examined. *Lucas* v. *South Carolina Coastal Commission*, 505 U.S. at 1029; *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011-1012 (1984); *Phillips v. Washington Legal Foundation*, __ U.S. __, 118 S. Ct. 1925, 1930-32, 141 L. Ed. 2d 174 (1998).

The resolution of the "parcel" dispute in this case turned in large measure on an examination of New Jersey's public trust doctrine and on interpretation of the tidelands grant of 1924. These were issues of State law that involved unique

State sovereign interests in public trust, tidally-flowed property. See *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892); *Idaho v. Coeur D'Alene Tribe of Idaho*, 521 U.S. 261 (1997); *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988); *Shively v. Bowlby*, 152 U.S. 1 (1894); *Martin v. Lessees of Waddell*, 41 U.S. 367 (1842). These State issues should not be revisited by this Court.

Further review by this Court will not be useful in addressing the "denominator" issue on a national level, and will require this Court to examine the uniquely State law issues and State public trust law that applied to petitioners' riparian land. However, this Court already has held that the examination of such issues should occur in the State courts, based on the States' special sovereign interest in public trust, submerged land. *Coeur D'Alene*, *supra*. For this reason as well, it would be entirely inappropriate to examine the "denominator" issue within the context of this case. The Petition for a Writ of Certiorari should be denied.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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